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NORTH CAROLINA REPORTS,

Vol. 19.

CASES AT LAW

ARGUED AND DETERMINED
IN THE

SUPREME COURT

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA.

DECEMBER TERM, 1836.

THE STATE v. HENRY SWINK.

1. Where the propriety of admitting testimony in the court below, depends upon an inference of fact, such inference must be drawn by that court; and the admission of testimony founded upon such inference, cannot be assigned as error in the Supreme Court.

2. Where it appeared upon a trial for murder, that the deceased came to her death in part by strangulation with a rope, and the prisoner while before the examining magistrate, but before the examination had begun, said—in reply to a bystander who had a rope in his hand, —"that is not the rope;" upon which the magistrate observed to the prisoner, "keep that to yourself;" it was *held*, that the prisoner's declaration was admissible in evidence against him, whether he desisted from speaking further of his own accord, or at the suggestion of the magistrate.

3. When a man, who is at full liberty to speak, and not in the course of a judicial inquiry, is charged with a crime and remains silent, that is, makes no denial of the accusation either by word or gesture, his silence is a circumstance which may be left to the jury, to be considered together with other circumstances, in deciding upon his guilt.

4. Where the judge, in charging the jury upon the subject of presumptive evidence in a capital case, stated that there were three grades, to wit, slight, probable and violent; that the jury was not to consider the first at all, but that they might act upon the two others, though the testimony must be such as to satisfy them, beyond a reasonable doubt, of the guilt of the prisoner; and further, that the circumstances must be as clear and as strong as the testimony of one credible and respectable witness—it was *held*, that taking the whole charge together, there was nothing in it of which the (10) prisoner had a right to complain.

5. It is no ground for vacating the verdict, or arresting the judgment, for one of the jurors in rendering the verdict to declare, that being forced by the laws of his country, he was bound to say, that the defendant was guilty.

STATE *v.* SWINK.

THE defendant was tried at ROWAN, on the last Circuit, before *Settle, J.*, for the murder of his wife.

In the course of the trial, it appeared in evidence that the deceased came to her death by a stroke upon her head, and by choaking and strangulation by means of a rope. It was then offered to be proved, on the part of the state, that the prisoner, when before the committing magistrate, and before his examination had commenced, said, in reply to an observation made by a person present who had a rope in his hand, "that is not the rope;" whereupon the magistrate said, "keep that to yourself;" and the prisoner said no more. This testimony was objected to, not because there had been any threats or persuasion, but because the prisoner, it was contended, had not by reason of the interruption, gone on to say all that he had intended to say: but the court overruled the objection, and admitted the testimony, because it did not appear to the Court that the prisoner intended to say any thing more, or that there was any examination in writing.

It appeared further in evidence, that before the prisoner was arrested, his mother-in-law charged him with murdering his wife, and said that his motive for so doing was, that he had had to pay some costs on his wife's account, a day or two before. This charge, it was proved, was made against the prisoner in his presence, at his own house, and when made that he was silent. His Honor charged the jury, that when a crime was charged against a person, in his presence and hearing, and he remained silent, it was a circumstance they might take into consideration in connection with other circumstances, in determining upon such person's guilt: That such evidence was not conclusive of the prisoner's guilt, but was only a circumstance to be taken into consideration
(11) with other circumstances in deciding upon his guilt.

Upon the subject of presumptive evidence, his Honor charged, "that there were three grades, to-wit, a violent presumption, a probable presumption, and a slight presumption; that the latter the jury were not to take into consideration; under the two former, they might act,—and gave them examples under each;—but the testimony must be such as to satisfy the jury beyond a reasonable doubt of the guilt of the prisoner; and further, that the circumstances must be as clear

and strong as the testimony of one credible and respectable witness."

Under these instructions the jury retired, and remained together about forty-eight hours, when having returned into court, and "being polled, and William S. Macay one of the jury being called on to say whether the said Henry Swink, the prisoner at the bar, was guilty or not guilty of the felony and murder whereof he stands charged, answered, that 'being forced by the laws of my country, I am bound to say he is guilty.' "

After his conviction, the counsel for the prisoner moved for a new trial;—

1st. Because the court had admitted improper testimony in permitting the prisoner's declaration about the rope, before the committing magistrate, to be given in evidence.

2ndly. Because the court had erred in charging the jury, that when a man, being charged with a crime, remained silent, his silence was an implied admission of his guilt.

3rdly. Because the court erred in charging the jury, that there were three kinds of presumptive evidence—probable presumptive evidence, violent presumptive evidence, and slight presumptive evidence; that the latter was not to be regarded by the jury; that the two first, either violent presumptive evidence, or probable presumptive evidence, was sufficient for a jury to act upon in a capital case.

4thly. The prisoner's counsel moved for a new trial, or in arrest of the judgment, as might appear most proper to the court, on the ground that after the jury had been confined forty-eight hours, one of them, when called upon to pronounce the prisoner's guilt or innocence, and "being forced by the laws of my country, I am bound to (12) say guilty."

The motions for a new trial and in arrest of judgment being overruled, and sentence of death pronounced, the defendant appealed.

Nash, for the prisoner.
The Attorney General, for the State.

GASTON, Judge.—The prisoner was convicted at the last Term of the Superior Court of Rowan, on an indictment for

the murder of his wife, and from the sentence pronounced on that conviction has appealed to this court. Several objections are here taken by his counsel to the regularity of the proceedings below. It is alleged, in the first place, that the Court erred in permitting improper testimony to be received against him. The material circumstances set forth in the case as connected with the subject-matter of the exception, are these: It appeared from the evidence, that the deceased came to her death by a blow on the head, by choking, and by strangulation with a rope. The prisoner was arrested as her supposed murderer, and carried before a magistrate for examination. There, but before the examination had begun, one of the bystanders was making some remark respecting a rope which he held in his hand, when the prisoner said, "that is not the rope." The magistrate observed to the prisoner, "keep that to yourself;" and the prisoner said no more. Evidence of these matter having been offered, the prisoner's counsel objected that this declaration of his ought not to be received, because he had been prevented by the interposition of the magistrate from stating all that he then intended to say: but this objection was overruled, and the testimony received, because it did not appear to the court that the prisoner intended to say any more, and because there was no examination in writing.

In support of this objection it is insisted, that whenever the declaration of any individual is offered in evidence against him, the law requires that the whole of the declaration should be heard; that the spirit of this rule would be violated if a declaration left unfinished by reason of an interrup-
(13) tion could be received as testimony without the explanations which were intended to accompany it; and that the admonition of the magistrate in this case indicates clearly an apprehension on his part, and therefore tends to show, that the prisoner had not finished all he then purposed to say, but desisted from proceeding, because of this admonition. Were we to assent to the correctness of this reasoning throughout, we do not see how we could pronounce that the judge had erred in admitting the evidence. Our authority is confined to the correction of errors of law, and wherever the propriety of admitting testimony depends upon an inference of fact, such inference must be drawn by the court to

whom the testimony is offered. The case states that the judge below drew a contrary inference from that which is pressed upon us. He inferred that the prisoner did not intend to add any explanatory matter on the subject of the declaration. But if we had the authority to examine into the correctness of this inference, we are by no means prepared to pronounce it incorrect. Instead of understanding the admonition as preventing the prisoner from making explanatory statements weakening the force of his declaration, we regard it as the benevolent suggestion of a humane magistrate, designed to put the prisoner on his guard against being drawn in by further remarks of the bystanders from observations tending to criminate himself, and that this suggestion was received and acted upon by the prisoner in the spirit which prompted it. It is proper, however, to add, that we do not assent to the position, that if the prisoner had proposed to make a more full statement, or to add an explanation thereto, and had changed his purpose in consequence of the suggestion of any one, the declaration already made could not be heard by the jury. It is undoubtedly law, that in criminal as well as in civil cases, the whole of an admission or declaration made by a party is to be taken together. We understand the rule to be as laid down by *Abbott, Chief Justice,* in the Queen's Case, 2 Brod. & Bing. 297 (6 Eng. Com. Law, 123): "If on the part of the prosecution a confession or admission of the defendant made in the course of a conversation (14) with the witness be brought forward, the defendant, has a right to lay before the court the whole of what was said in that conversation, not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the matter introduced by the previous examination, provided only that it relates to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against a party without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion." But we find no authority, or *dictum* to warrant the supposed qualifications of the general principle which makes a man's conduct and declaration when voluntary, admissible against him so as to exclude evidence of his acts or declarations because not as complete as he intended that they should be. It

seems to us what he has said and what he has done, however unfinished and imperfect, is competent testimony, and its proper effect is to be judged of, under all the accompanying circumstances, by those whose duty it is to weigh the evidence.

The counsel for the prisoner have excepted to the charge of the judge, for that he instructed the jury that when a man charged with a crime remained silent, his silence was an implied admission of his guilt. We find in the charge no such instruction as that excepted to. It appears from the case, that the mother of the deceased, after the death of her daughter, and before the prisoner was arrested, at his house and in his presence charged the prisoner with the murder, and told him that his motive was, because he had been obliged a few days before to pay some costs on her account, and that the prisoner remained silent under this accusation. The Court instructed the jury that this silence was not conclusive evidence of the prisoner's guilt, but was a circumstance which they might take into consideration in passing upon the question of his guilt. We see nothing in this instruction which is erroneous. It has been well observed by an able elementary writer (Mr. Starkie) that all the surrounding facts
(15) of a transaction may be submitted to a jury when they afford any fair presumption or inference as to the question in dispute. Upon this principle it is that the conduct of the accused at the time of the offence, or after being charged with it, such as "flight—the fabrication of false and contradictory statements—the concealment of the instruments of violence—the destruction or removal of proofs tending to show that an offence has been committed, or to ascertain the offender," are all receivable in evidence as circumstances connected with and throwing light upon the question of imputed guilt. Of the same character is the silence of the accused when free to speak, and a decided denial of guilt if he be innocent may rationally be expected from him. It is argued, that silence under such an accusation may proceed from indignation, scorn, unwillingness to answer impertinent inquiries, or other motives consistent with the fact of innocence. So indeed it may; and therefore evidence of silence ought never to be regarded as conclusive proof of guilt; should always be weighed with care; and should not be received at all, when the accused is not at full liberty to repel the accusation. But

who can deny that tame submission to a direct charge of crime ordinarily proceeds from a consciousness of guilt, from the anguish of remorse, from the terror consequent upon guilt, or from the difficulty of determining whether confession or denial will be more likely to propitiate favour and secure escape from punishment? We cannot doubt therefore that it is a circumstance proper to be left to the consideration of those whose experience and observation qualify them to judge of the motives, passions and feelings by which human conduct is impelled. But it is insisted that though the prisoner *said* nothing when this crime was charged home upon him, by his deceased wife's mother, he may have repelled the accusation by gestures or other expressive signs—to which we answer, that unquestionably this would not be *silence,* and it cannot for a moment be supposed that the court in giving, or the jury in receiving the instruction, considered a denial so manifestly characterized as silence. But adjudged cases have been produced which are supposed to establish, that however in general the admission of a fact may be inferred from the silence of a party when such fact is asserted (16) in his presence, and that therefore such assertion and such silence may in general be given in evidence against him —yet this inference cannot be drawn, and this evidence cannot be received in criminal cases. For this purpose the cases of *Child v. Grace,* 2 Car. & P. 193 (12 Eng. Com. Law, 84) and *The King v. Appleby,* 3 Star. Ca., 33 (14 Eng. Com. Law, 152) are quoted, but in our opinion they by no means support the position. In the first of these, evidence was offered of what the *magistrate* had declared in the presence of the plaintiff on the examination before him for the alleged assault, and in the other, evidence was offered of the confession of another person made before the examining magistrate in the presence of the prisoner, his supposed associate. In each case the evidence was rejected, and the true ground of rejection is plainly pointed out in *Melar v. Andrews,* 1 Moody & Malk. Ca., 336 (22 Eng. Com. Law, 329) that although what has been said in the presence of a party is admissible, as tending to raise an inference from his silence, it is not so with regard to the assertions or declarations made in his presence in the course of a judicial inquiry, for in such investigations a regularity of proceedings is adopted which prevents the party from

interposing when and how he pleases, as he would in a common conversation. The *general* rules of evidence are certainly the same in criminal as in civil cases. "There is no difference as to the rules of evidence," says *Abbott, Chief Justice,* in Watson's Case, 2 Star. Ca., 155, "between criminal and civil causes; what may be received in the one may be received in the other; and what is rejected in the one ought to be rejected in the other." Before we can admit the exception here contended for to the confessedly general rule, we must have evidence, which we have not seen, that the law sanctions such exceptions.

The prisoner's counsel have also objected to that part of the judge's charge which relates to the force of presumptive evidence. If the whole of this be taken together, we believe that no well-founded complaint can be made against it. We know not what were the illustrations given of the differ-
(17) ence between violent, probable, and light presumptions, but as no exception has been taken to any of them, we must presume that they were correct. The jury may not have been aided by this classification, but we do not see that they have been misled thereby. If the judge meant to say that no regard whatever should be paid to circumstances individually raising but a slight presumption against the prisoner, however numerous they might be, and however impressive and convincing the result of their coincidence with each other, and even with circumstances of a more conclusive tendency, we apprehend that he laid down a rule more favourable to the prisoner than the law prescribes. Every circumstance, however slight in itself, that is calculated to throw light on the commission of the supposed crime, is proper to be considered; although a verdict against the prisoner cannot be warranted by any combination of circumstances producing less than full assurance of his guilt. To circumstantial evidence effecting this moral certainty, the law attaches the designation of violent presumption. Could we collect from his charge that the judge may have conveyed to the jury the impression that they might find their verdict upon evidence, raising altogether but a *probable presumption* of guilt, we should not hesitate a moment in reversing the judgment and ordering a new trial: but this construction cannot be put upon it, since we find him instructing them in the most explicit

terms, that the circumstantial testimony must be such as to satisfy them beyond a reasonable doubt as to the guilt of the prisoner, and as strong and clear as that which would be derived from the testimony of one credible and respectable witness. Whenever the circumstances combined produce this moral certainty, and are fully equivalent to this direct and positive testimony, reason and law both declare that a jury may rightfully convict.

We see no ground whatever either for a new trial, or for vacating the verdict, or for arresting the judgment, because of the language used by one of the jurors in declaring his assent to the verdict when the jury was polled. It is but a manifestation of the reluctance with which he yields to the obligations of an imperious but painful duty. All the (18) objections made in behalf of the unfortunate prisoner, are in our opinion untenable, and we have been unable to perceive any errors which can avail him against the awful judgment which the law pronounces upon his crime. This opinion must therefore be certified to the Superior Court of Rowan, with directions to proceed to sentence of death against the prisoner agreeably to this decision and the laws of the state.

PER CURIAM. Judgment affirmed.

Cited: State v. Collins, 30 N. C., 413; *State v. Rash,* 34 N. C., 389; *State v. Parker,* 61 N. C., 477; *State v. Patterson,* 63 N. C., 520; *State v. Worthington,* 64 N. C., 595; *Covington v. Steele,* 84 N. C., 147; *State v. Pratt, Ib.* 642; *State v. Sheets,* 89 N. C., 550; *State v. Case,* 93 N. C., 546; *State v. Carson,* 95 N. C., 595; *State v. Rowe,* 98 N. C., 633; *State v. Brackville,* 106 N. C., 710.

THOMAS BELL v. JOHN CULPEPPER, et al.

1. The doctrine of election, by which a person is prohibited from taking a benefit under a will, and at the same time disappointing the plain provisions of that will in favor of third persons, is confined to courts of equity, and does not affect titles at law.

2. A residuary clause in a will, by which all the remainder of testator's real and personal estate was directed to be sold by his executors, will not pass slaves which he had given to a child by parole prior to 1806, but which he had subsequently obtained possession of, and held as bailee until his death, nor will it authorize a sale of said slaves by the executors so as to defeat the title of the donee under the act of 1784, (*Rev. ch. 225*, s. 7.)

3. The cases of *Knight v. Thomas*, 2 N. C. 289; *Cutlar v. Spiller*, 3 N. C. 61; *Latham v. Outen*, Ib. 66; *Anon.* Ib. 86; *West v. Dubberly*, 4 N. C. 478; *Sherman v. Russel*, Id. 79; *McCree v. Houston*, 7 N. C. 429; *Watford v. Pitt*, Ib. 468; *Lynch v. Ashe*, 8 N. C. 338; *Rhodes v. Holmes*, 9 N. C. 193, approved.

DETINUE for two slaves by the names of Esther and Bob. Pleas, *non detinet* and *statute of limitations.*

Upon the trial at Anson, on the last Circuit, before *Saunders, J.*, the plaintiff claimed the slaves under a parol gift to his wife, made by her father, Richard Russell, Sen., in the year 1802, and introduced several witnesses, who, if they were to be credited, clearly established the fact of the gift as alleged. He further proved, that he intermarried with the daughter of the donor in 1820; that he soon after went off to house-keeping; that the slave Esther being then confined in childbed, was not taken home with him immediately, but was sent to him in about a year afterwards, and, together (19) with her child, remained with him more than twelve months, when she ran off and returned to her old master. The plaintiff being involved in his circumstances, his father-in-law said he would not send back Esther and her child, but would keep them until his son-in-law should get out of debt. Accordingly, Esther and her children (she having had another,) remained in the old man's possession from that period until his death in 1834, he repeatedly declaring during the time, that he had given Esther to his daughter, the wife of the plaintiff, and that the said negro woman and her children belonged to his daughter.

On behalf of the defendants several witnesses were exam-

ined as to the alleged gift, and for the purpose of establishing an adverse possession in the father-in-law. The defendants then introduced the will of Richard Russell, Sen., in which the testator bequeathed to the plaintiff's wife and children a negro girl by the name of Charlotte, who was a child of the woman Esther. In the will there were several other specific legacies, in none of which, however, were the slaves in controversy included; and then followed a residuary clause directing the remainder of the testator's estate, both real and personal, to be sold, and the proceeds to be divided between certain persons therein named. The defendants then proved a sale of the slaves in question by the executor, and a purchase by themselves at a full price, evidenced by a bill of sale properly authenticated. They proved also that when the plaintiff heard of the bequest of the girl Charlotte to his wife and children, he said he was satisfied; and that he afterwards had the said girl in possession. For the defendants it was contended, and the court was requested so to instruct the jury, that however they might find as to the gift and possession, as Richard Russell died having the slaves in his possession, they passed by the will, and the defendants being purchasers for value (whether with or without notice,) at the sale by the executor, were protected by the act of 1784; and further, that as the plaintiff had taken the girl Charlotte into his possession, it was such an election to take under the will, that he could not now claim in contradiction to it. But his Honor, after submitting to the jury the questions of the gift, (20) and the possession of the father-in-law, whether he held adversely, or as bailee of the plaintiff, further instructed them, that if they should find for the plaintiff on both these points, then the slaves Esther and Bob formed no part of the testator's estate, and did not pass under his will; and that the plaintiff's right to recover was not affected by his having received into his possession the girl Charlotte. Under this charge a verdict was found for the plaintiff; and a new trial being refused, the defendants appealed.

Badger, for the defendants.
Mendenhall, for the plaintiff.

GASTON, Judge. The exception taken below to that part of the judge's instruction which held that the plaintiff was

not barred of his recovery by reason of an election to take the negro Charlotte under the will of Richard Russell, has very properly been given up here. The rule of election in the sense in which it is insisted on by the defendant, is confined exclusively to courts exercising equitable jurisdiction, which have it in their power to restrain men from the unconscientious assertion of acknowledged legal rights. They hold that it is against conscience for a man to take a benefit under a will or other instrument, and at the same time disappoint other plain provisions of that will, made in favour of third persons. Of course, he may keep, if he pleases, what was before his own; for the mistake of the donor cannot take away his property; but if he will insist on enjoying the interest given him by the instrument, they will by proper decree provide, that so enjoying it he shall give *effect* as far as he can to the other provisions of the instrument. It is not perceptible to us that *any* case for an election has been made out; but however that may be, the *law* certainly raises no election in this case.

The exception taken to the residue of the judge's instruction must also, we think, be overruled. If the slaves in controversy were not held by Richard Russell as his property, but were merely in his occupancy as in that of the bailee of the plaintiff, it is very clear that they were not comprehended in the bequest to his residuary legatees, and did not
(21) vest by law in his executors. The construction of the act of 1784 (Rev. ch. 225, s. 7) must now be considered as perfectly settled. A long series of decisions has established that under *that* act a parol gift of slaves may be good against all persons except the creditors of the donor, or purchasers from him. See *Knight v. Thomas,* 2 N. C., 289; *Cutler v. Spiller,* 3 N. C., 62; *Latham v. Outen, Ibid.* 66; An Anonymous Case, *Ibid.* 87; *West v. Dubberly,* 4 N. C., 478; *Sherman v. Russel, Ib.* 79; *M'Kee v. Houston,* 7 N. C., 429; *Watford v. Pitt, Ib.* 468; *Lynch v. Ashe,* 8 N. C., 338; *Rhodes v. Holmes,* 9 N. C., 193.

PER CURIAM. Judgment affirmed.

DEN ex dem. JEREMIAH INGRAM v. LEMUEL D. KIRBY, et al.

1. In ejectment for land purchased at a sheriff's sale, under an order of sale made by the County Court upon the return of a constable that he had levied on the lands of the defendant, the purchaser must show the justice's judgment returned to court according to the directions of the act of 1794, *Rev. ch.* 414, s. 19; and an entry on the trial docket of the court at the foot of the case of an "order of sale," is not such a judgment as the law requires to be shown.

2. Where a justice's execution has been levied upon lands and returned to the County Court, the production of the trial docket of the court containing a mere note or memorandum of the case, with an "order of sale." entered at the foot of it, together with the testimony of the clerk that after a diligent search he had been unable to find the original papers in the suit, is not sufficient evidence of the loss of the justice's judgment, if evidence of such loss be admissible.

The cases of *Bryan v. Brown*, 6 N. C. 343, and *Hamilton v. Adams*, *Ib.* 161, approved.

EJECTMENT, tried at ANSON on the last Circuit, before *Saunders, J.*

The lessor of the plaintiff claimed the land in dispute as a purchaser at a sheriff's sale, and offered in evidence, first, the trial docket of Anson County Court, on which was found the following entry: (22)

"January Term, 1832.

Kirby Henry *v.* Robert Hildreath and Jilson B. Douglas, security,	Judgment, March, 1831,	$35 00
	Interest	50
	Cost	1 20

"Levied on 150 acres of land lying on the waters of Pedee, adjoining George Ingram and others, as defendant's property.

JAS. HORN, Const.

Order of Sale."

He then introduced the clerk of Anson County Court, who deposed that he had made diligent search in his office, but had been unable to find any of the original papers relating to the suit of *Henry v. Hildreath and Douglas.* This evidence was objected to by the defendant's counsel, but was received by the Court. The plaintiff then offered a writ of *venditioni*

exponas, tested of October Term, 1831, and returnable to January Term, 1832, on which was an endorsement by the sheriff that the land was sold 10 January, 1832. He further offered a deed from the sheriff covering the land in dispute, dated 4 July, 1832. The defendant relied upon a deed of bargain and sale for the same land, executed by the said Robert Hildreath, and dated 9 April, 1832. The jury, under the charge of his Honor, returned a verdict for the plaintiff, and the defendants appealed.

No counsel appeared for the defendants in this Court.
Mendenhall, for the lessor of the plaintiff.

DANIEL, Judge. The act of Assembly of 1794, (Rev. ch. 414, s. 19), requires, that when a constable has levied on land, the justice shall return such execution with all other papers on which the judgment was given to the next Court to be held for said county; which land, shall by order of said court be sold by the sheriff of the said county, or so much thereof as may be sufficient to satisfy such judgment, in the same manner as real property is sold by writs of *fieri facias* or *venditioni exponas* issuing from such Courts; and the clerk
(23) of the Court where such papers are returnable shall, in a well bound book kept for that purpose, record the whole of the papers and proceedings had before the justice, and he shall be allowed the same fee as for entering a judgment in any other suit. It is a well settled rule, in this state, that in ejectment, the purchaser at a sheriff's sale is bound to show the judgment on which the execution issued; *Bryan v. Brown,* 6 N. C., 343. And where he purchases under an order of sale, made by the County Court upon the return of a constable, that he "had levied upon the land of the defendant, there being no personal property to be found," he must show the judgment recovered before the justice of the peace. *Hamilton v. Adams,* 6 N. C., 161. The plaintiff in this case did not show any judgment of a justice which had been returned to the County Court and recorded; neither did he show if such evidence be admissible, that such judgment had subsequently been lost. The memoranda or notes on the docket, and what the clerk swore, did not prove that fact. We think, that the plaintiff was bound to show, that a justice's judgment

had been rendered against Hildreath; and that after the levy on the land by the constable, it had been returned into the County Court of Anson, to justify the *"order of sale"* made by the said court. The entry on the trial docket of the *"order of sale,"* is not the judgment which the law requires to be shown. When a judgment is regularly entered, the *award* of execution is always entered on the roll at the foot of the judgment, but this award or fiat for execution to go, composes no part of the judgment. We therefore think the judge erred in permitting the *venditioni exponas* to be given in evidence for the plaintiff without proof of any justice's judgment ever having been rendered against Hildreath and returned to Court, to authorize the Court to make an order of sale, or award such an execution.

There must be a new trial.

PER CURIAM. Judgment reversed.

Cited: Blanchard v. Blanchard, 25 N. C., 107; *Collais v. McLeod,* 30 N. C., 223.

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(24)

JOHN NISBET v. MARTHA STEWART, Executrix of FINLEY G. STEWART.

1. A resident of this state, at whose house a citizen of Georgia died while on a visit, cannot, in a suit by a creditor of the deceased living in Georgia, be rendered responsible as an executor *de son tort* for taking possession of a sum of money which the deceased had with him at the time of his death, and paying it over, without notice of the creditor's claim, to a person who had administered upon the effects of the deceased in Georgia.

2. Whether in such case he would be responsible to a creditor in this state? *Quaere.*

THIS action was brought by the plaintiff, who is a citizen of the state of Georgia, against the defendant, as the executrix of one Finley G. Stewart, deceased. The defendant plead, *"ne unques executrix;"* to which the plaintiff replied, that she was executrix of her own wrong; and upon this replication issue was joined. Upon the trial at Iredell, on the last Circuit, before his Honor *Judge Dick,* it appeared in

evidence, that Finley G. Stewart, whose residence had been in the state of Georgia, came to Iredell county in this state, on a visit to the defendant, who was his mother, and there died: that he had with him at the time of his death the sum of four hundred and thirty-four dollars in money, which the defendant took possession of, and without any notice of the plaintiff's claim, paid it over to one James G. Stewart, who had been appointed administrator on the estate of Finley G. Stewart, by the Court of Ordinary for Fayette county, in the state of Georgia. His Honor was of opinion that this evidence did not establish such an officious intermeddling with the goods of the deceased as would subject the defendant as an executrix of her own wrong. The plaintiff, in submission to this opinion, suffered a non-suit and appealed.

No counsel appeared for the plaintiff in this Court.
D. F. Caldwell, for the defendant.

DANIEL, Judge, after stating the case as above, proceeded: *Judge Story,* in delivering his opinion in the case of *Trecothick v. Austin,* 4 Mason, 32, said, that the general (25) position stated at the bar, that no executor or administrator appointed under a foreign government, can, in virtue of such appointment, sue in our courts, is admitted, But payments voluntarily made to a foreign administrator would now be held effectual in our Courts upon the principles of national comity. This doctrine is supported by *Atkins v. Smith*, 2 Atk., 63, and still more fully and forcibly illustrated by the opinion of Chancellor Kent in the case of *Doolittle v. Lewis,* 7 John, Ch. 45. The Chancellor in that case said, (page 49) that an executor or administrator of a creditor, dying in another state, and becoming lawfully possessed, as part of his assets, of a bond given and secured by a mortgage upon the lands in this State, is competent, as I should apprehend, to receive payment, and give an acquittance, without first resorting to the Court of Probates here. The defendant here took charge of the money to prevent its being wasted. She, without any knowledge of the plaintiff's claim, or of any creditors in this state, honestly paid it over to the Georgia administrator. We are of the opinion, that whatever might be the liability of the defendant to a North Carolina creditor,

on which we do not decide, nevertheless, as in this case the assets for which it is endeavoured to render her responsible, have been placed in the hands of the proper representative of the deceased in the state where he was domiciled, and where the plaintiff is domiciled, and are there liable to the demand of the plaintiff as they should be according to the laws of that state, the plaintiff cannot claim that she was executrix of her own wrong.

PER CURIAM. Judgment affirmed.

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(26)

JOHN P. SMITH v. NATHAN YOUNG.

If an infant live with his parent, who provides for his child every thing which in his judgment appears to be proper, the infant cannot bind himself to a stranger, even for such articles as might under other circumstances, be deemed necessaries But if the infant live apart from his father, laboring, and receiving the profits of his labor to his own use, he is *pro tempore* acting as his own man, by the assent of his father, and will be liable for necessaries suitable to his condition.

THIS was an action of ASSUMPSIT, to which the defendant plead "infancy" and the plaintiff replied, that "the articles furnished were necessaries."

Upon the trial at Stokes, on the last Circuit, before *Settle, J.*, it appeared that the defendant lived separate and apart from his father, with one of his brothers, for whom he laboured, and from whom he received compensation for his labour, for his own use. The defendant's father lived in the same neighborhood, about a half a mile from his brother's, where he lived, and was a man in reasonable circumstances. Upon this statement of facts, his Honor charged the jury, that if they should be of the opinion that the articles purchased were suitable to the age, condition, standing and situation in life of the defendant, and that they were necessaries suitable to his degree, the law held him responsible for the payment of them: but that if the articles purchased were not necessaries suitable to the defendant's condition in life, he was not responsible for the payment of them. The jury, under this charge, returned a verdict for the plaintiff. A

new trial was moved for on account of misdirection and error in the charge, which being refused, the defendant appealed.

No counsel appeared for either party in this court.

DANIEL, Judge, after stating the case, as above, proceeded: The question, whether necessaries or not, is a mixed question of law and fact, and as such should be submitted by the judge to the jury, together with his directions upon the law; whether articles furnished to an infant are of the classes for which he is liable, is matter of law; whether they were (27) actually necessary, and of reasonable price, is matter of fact for the jury. *Beeler v. Young,* 1 Bibb, 519; *Stanton v. Wilson,* 3 Day., 37; Cro. Eliz., 587. What were the articles purchased, does not appear in this case; therefore we are to take it that the articles were in law and fact considered as necessaries. We gather from the case, that the sole objection taken to the charge was, that the judge did not direct the jury to find for the defendant (although the articles were necessaries) inasmuch as his father was alive, and in reasonable circumstances, and lived but a short distance from the defendant. The law is, if an infant is living under the roof of his parent, who provides every thing which in his judgment appears to be proper, the infant cannot bind himself to a stranger, even for such articles as might, under other circumstances, be deemed necessaries. *Cook v. Deaton,* 3 Car. & P., 114; (14 Eng. Com. Law, 232). *Bainbridge v. Pickering,* Black., 1325; *Barrinsdale v. Greville,* 1 Selw. N. P., 127. But here the defendant did not live under the roof of his parent, but lived apart from him, labouring, and receiving the profits of his labour to his own use. He was *pro tempore* acting as his own man, by the assent of his father; and the articles received by him being necessaries, should be paid for by him. *Madox v. Miller,* 1 Mau. & Sel., 738; 10 Petersdorf's Abr., 376. We think the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Jordan v. Coffield, 70 N. C., 113.

JOSEPH GIBSON, Chairman, etc., v. JOSEPH WINDSOR.

In an action of debt upon a penal bond, where the declaration states all the conditions to be broken, the verdict of the jury, which finds "the conditions of the bond" not to have been performed, but broken, need not specify the particular *breaches* upon which the damages are assessed. That is proper only when some of the conditions are found to be broken, and others not broken.

This was an action of debt upon a penal bond payable to "the Chairman of the County Court of Guilford," and conditioned for the building and keeping up a public (28) bridge. The defendant, after oyer, pleaded the "general issue; conditions performed; no breach."

At the trial, which was had at GUILFORD, on the last Circuit, before *Settle J.*, it was admitted, that Joseph Gibson, the plaintiff, was the Chairman of the County Court of Guilford; and that the bridge had been destroyed by a freshet, within the time specified in the condition of the bond. But it was contended by the defendant, that he had never, in fact, executed the bond; and upon this point much testimony was introduced on both sides, which it is unnecessary to state. The jury, under the charge of his Honor, returned a verdict for the plaintiff, finding that the bond declared on was the act and deed of the defendant; that the conditions of the said bond had not been performed, but broken; that the penalty of the bond was six hundred dollars; and for the breaches thereof they assessed the plaintiff's damages to one hundred dollars; and upon this verdict a judgment was rendered accordingly. The defendant submitted a motion for a new trial, upon the ground that the evidence was insufficient to prove that the bond declared on had been executed by the defendant; but this being overruled, he then moved in arrest of judgment; which being also refused, he appealed.

Winston, for the defendant.
W. A. Graham, contra.

DANIEL, Judge: The objection, as to the sufficiency of the evidence to prove that the defendant executed the bond, has been abandoned. So likewise has the objection, as to the averment in the declaration and proof thereof, that Gibson,

the plaintiff, was Chairman of the County Court of Guilford. But the defendant insists on his motion in arrest of judgment; because the jury, in rendering their verdict, have said, "that the conditions of said bond have not been performed, but broken; and for the *breaches thereof,* assess the plaintiff's damages to the sum of one hundred dollars;" and have not stated in their verdict for what *breaches* they assessed the damages. The answer is, we think, very plain. The (29) *breaches* upon which the jury assessed the damages, must necessarily be all the particular *breaches* set out in the declaration. It is not necessary for the jury to particularize the *breaches,* if they find *all* that is charged in the declaration to be true, as there stated. But if the jury should find some of the *breaches* stated in the declaration to be true, as there stated, and others not true, it would then be proper for the jury to particularize the *breaches* on which they assessed the damages. We think there is no ground for a new trial, or to arrest the judgment; and the same is affirmed.

PER CURIAM. Judgment affirmed.

THE STATE v. MOSES RITCHIE.

In an indictment under the act of 1830, ch. 10, against a white man, for playing cards with slaves, it is sufficient to charge, that the defendant "unlawfully did play at a game of cards," without specifying the name of the particular game played at with the cards.

THE defendant was convicted, together with one Alexander Hill, at Surry, on the last Circuit, before *Dick, J.,* upon the following bill of indictment:

"The jurors for the state upon their oath present, that Moses Ritchie and Alexander Hill, both late of said county, and both white men, on the first day of March, in the year of our Lord one thousand eight hundred and thirty-four, with force and arms, in said county, unlawfully did play at a game of cards with two slaves, viz.: John, the property of one Peter Clingman, and Juan; contrary to the statute in such case made and provided, and against the peace and dignity of the state."

STATE *v.* RITCHIE.

A motion in arrest of judgment was submitted by the counsel for the defendants; which being overruled, and judgment pronounced, the defendant, Ritchie, appealed.

(30)

No counsel appeared for the defendant in this Court; and *The Attorney-General,* for the state, submitted the case, without argument.

DANIEL, Judge: The act of the general assembly, passed in the year 1830, ch. 10, enacts, "that it shall not be lawful for any white person, free negro, or mulatto, to play at any game of cards, dice, nine-pins, or any game of chance or hazard, whether for money, liquor, or any kind of property, or not, with any slave or slaves; and any white person, so offending, shall be guilty of a misdemeanor, &c." The defendant, a white man, has been indicted under this act, and found guilty by the jury. He moved in arrest of judgment; which motion was overruled by the Court, and judgment rendered against him; from which he has appealed to this court. There is no particular reason in arrest assigned. We have examined the whole record, and do not discover any reason why the judgment should be arrested. The act prohibits the playing at *any* game of cards; the indictment charges, that the defendant "unlawfully did play at a game of cards, with two slaves, &c." It does not set forth the name of the game played on or with the cards; and we are of the opinion, that the name of the game played at by the parties, need not be particularly set forth in the indictment. The present indictment sufficiently describes the offence, to enable the defendant to see what he is charged with; and therefore properly to defend himself. It enables the jury to see distinctly of what offence they are to declare, by their verdict, that the defendant is or is not guilty; and finally, it is sufficiently certain, to enable the court to see what judgment it should (on conviction) pronounce. We therefore direct, that the clerk of this Court certify to the Superior Court of law for the county of Surry, that it proceed to render judgment for the state against the defendant.

PER CURIAM. Judgment affirmed.

Cited: State v. Stamey, 71 N. C., 203.

(31)

THE STATE v. WILLIAM C. LOFTIN.

1. Where statute creates an offence, and not only declares the specific penalty, but also the mode in which it shall be recovered, that particular method, and no other, must be pursued. Hence it is not indictable, for a justice of the peace to celebrate the rites of matrimony, without a license from the clerk of the County Court, under the act of 1778, (*Rev ch. 134,*) as that act not only makes that an offence, which was not so at common law, but also annexes the penalty, to wit, fifty pounds; and the mode of recovery, to wit, by action of debt.

2. In an indictment on a statute, no allegation of unlawfulness, nor of being against the statute, nor any conclusion, will make good the indictment, if it does not bring the fact prohibited or commanded, in the doing or not doing whereof, the offence consists, within the material words of the statute. Hence, if the statute forbids the doing of a particular act, without the authority of either one of two things, the indictment must negative the existence of both those things, before it can be supported.

THE defendant was put upon his trial, at Lenoir, on the last Circuit, before *Donnell, J.,* on an indictment, containing two counts; upon the first of which he was found guilty, and upon the second, not guilty. A motion in arrest of judgment, being submitted by the defendant's counsel, his Honor was of opinion, that the offence charged in the first count of the indictment was not an indictable one, and therefore arrested the judgment; and the Solicitor, Stanly, appealed. This count was in the following words, to-wit:

"The jurors for the state, upon their oath present, that "William C. Loftin, Esquire, late of the county of Lenoir, "on the first day of March, in the year of our Lord one thou- "sand eight hundred and thirty-six, then and there, in the "state and county aforesaid, being a justice of the peace, in "and for the said county, with force and arms, unlawfully, "knowingly, wilfully, and contrary to the duty of his office, did "celebrate the rites of matrimony, between Frederick Litch- "worth and Betsey Humbles, at and in the county and state "aforesaid; and the said William C. Loftin, Esquire, did then "and there join together, as man and wife, the said Frederick "Litchworth and Betsey Humbles, without license first had "and obtained for that purpose, contrary to the form
(32) "of the statute in such case made and provided, and "against the peace and dignity of the state."

No counsel appeared for the defendant in this Court.
The Attorney-General, for the state.

GASTON, Judge: The indictment against the defendant contains two counts, but the defendant has been found guilty upon the first count only. The Superior Court arrested the judgment, and the state appealed.

We are of opinion, that the judgment was properly arrested, for that the count upon which the defendant has been found guilty, is insufficient to warrant any judgment.

It charges, in substance, that the defendant, being a justice of the peace, did unlawfully and knowingly celebrate the rites of matrimony between the persons therein named, "without license for that purpose first had and obtained, contrary to the statute in such case made and provided." The statute referred to, is that of 1778, (Rev. ch. 134). The first section of this act authorizes ministers of the gospel, of every denomination, having the care of souls, and justices of the peace, to solemnize the rites of matrimony, according to the rites and ceremonies of their respective churches, and agreeably to the rules in that statute prescribed. The second empowers the clerks of the respective County Courts to issue a marriage license to any persons applying therefor, first taking bond with sufficient security, in the sum of five hundred pounds, with condition that there is no lawful impediment to obstruct the marriage for which such license is desired; which license shall be directed to any authorized minister or justice of the peace. The third authorizes every minister of the gospel, qualified as above expressed, or any other person appointed by the church, as a reader, to publish the banns of matrimony between any two persons desiring the same, on three several Sundays, in the congregation, during or immediately after divine worship; and directs them to give a certificate of such publication, if demanded, directed to any authorized minister or justice of the peace; with a proviso, that the People called Quakers shall retain their former rules and privileges in solemnizing the rites of matrimony in their own (33) church, anything in the act contained to the contrary notwithstanding. The fourth section then enacts, that if any minister or justice of the peace shall knowingly join together in matrimony any two persons in any other way or manner

than by the act directed, he shall forfeit and pay for every such offence the sum of fifty pounds, lawful money, to be recovered in an action of debt; one-half to him that will sue for the same, and the other half to the use of the county, where the forfeiture ariseth. Upon this act it has been judicially settled, that no valid marriage can be celebrated within this state, unless through the intervention of a minister or magistrate; but that a marriage so celebrated may be valid, notwithstanding there has not been a previous license or publication of banns, although the minister or magistrate performing the marriage rites without an observance of either of these important forms, devised as securities against unlawful and clandestine marriages, is clearly guilty of an offence, and liable to be punished therefor. But this offence is *created* by the statute. Independently of some statutory enactment—and there is no other in force applicable to this subject—the celebration of a marriage without banns or license is not an offence in law. Every offence must be visited with the penalty, and in the way, which the law points out. Wherever, therefore, a statute creates a new offence, by making that unlawful, which was lawful before, and attaches a specific penalty, the offender may be indicted therefor, although express mention is not made of proceeding by indictment, because indictment is an appropriate mode of judicially ascertaining the offence; but no other penalty can be inflicted, than the one denounced. Where the statute so creating the offence, not only declares the specific penalty, but the mode in which it shall be recovered, that particular method must be pursued, and no other. Castle's Case, Cro. Jac., 64; 1 Salk., 45; *Rex v. Robinson*, 2 Bur., 803. A conviction upon this indictment would not bar the penal action which the statute authorizes any informer to institute; and if the defendant should be punished under this indictment, and be afterwards made
(34) liable for the penalty in such action, there would then be inflicted on him a greater penalty than the law assigns to his offence.

There is another fatal objection to the indictment. The charge should contain such a description of the offence of which the defendant is accused, and such *a statement of the facts which constitute the offence;* that when he is found guilty thereof, the court can see upon the record the definite

offence to which the judgment of the law may be applied. No latitude of intention can be allowed, so as to include anything more than is expressed; for the charge must be explicit enough to support itself. Therefore, no allegation of unlawfulness; nor of being against the statute; nor any conclusion, will make good an indictment on a statute, which does not bring the fact prohibited or commanded, in the doing or not doing whereof the offence consists, within the material words of the statute. Now the statute said to be violated does not make it an offence to celebrate a marriage without a license—but to celebrate it without license, and without publication of banns. All the *facts* found by the jury may be *true;* and yet an offence may not have been committed. The indictment negatives the observance of one ceremony, but not of another; when either ceremony would have legalized the conduct of the defendant.

It must be certified to the Superior Court, that there was no error in refusing to render a judgment upon the finding of the jury in this indictment.

PER CURIAM. Judgment affirmed.

Cited: State v. Snuggs, 85 N. C., 543; *State v. Chambers,* 93 N. C., 604; *State v. Hazell,* 100 N. C., 474; *State v. Dalton,* 101 N. C., 683.

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(35)

THE STATE v. DUNLAP SCOTT.

1. To repel the allegation of an *alibi*, it is relevant to prove, that on the morning after the offense was committed, a servant of the defendant went to a neighbor's house, to borrow a pair of saddle-bags; and returned with them towards home, if it be further proved, that the defendant was seen soon afterwards, with a pair of saddle-bags, going in a direction from home.

2. It is not error for a judge to omit remarking upon a part of the testimony, if no particular charge in relation to it be prayed.

3. After a trial and conviction have been had in a county to which the cause has been removed, upon a motion in arrest of judgment, for a defect in the transcript of the record, the judge may suspend the judgment, and order a *certiorari*, for a more perfect transcript; and if, upon the return of the *certiorari* to the next term, it appears, that the first transcript contained a full and complete record of the pro-

ceedings, although it was written upon two separate and detached sheets of paper; the first containing the indictment, plea, and order of removal, and the second, the other entries, with the certificate of the clerk; the court may then proceed to pronounce judgment; for it then appears, that it had jurisdiction of the cause, at the term when the trial took place.

4. An indictment for malicious mischief may conclude at common law; and in such indictment, it is not necessary to charge malice against the owner of the property injured.

5. *State v. Simpson*, 9 N. C. 460, approved.

AT the Fall Term, 1833, of Rutherford Superior Court, the following bill of indictment was found against the defendant, to-wit:

"The jurors for the state upon their oaths present, that Dunlap Scott, late of said county, on the first day of October, in the year of our Lord one thousand eight hundred and thirty-three, with force and arms, in said county, one steer, of the value of five dollars, of the goods and chattels of one Levi M'Clure, then and there being, then and there unlawfully, wantonly, maliciously and mischievously did kill, to the great damage of the said Levi M'Clure, and against the peace and dignity of the state." The defendant pleaded not guilty; and at the ensuing Spring Term of the said Court, the case was, on his affidavit, ordered to be removed to the county of Buncombe, for trial. The clerk of Rutherford Superior Court accordingly made out what purported to be a transcript of the case, and sent it to Buncombe, where it (36) was received, placed among the records, and entered upon the docket of causes for trial at the Fall Term, 1834, of said county. This transcript was written on two pieces of paper, which were not attached to each other; the indictment, plea, and order of removal being contained in the first piece, and the other entries, with the certificate of the clerk, being on the second; but both pieces together contained a complete record of the case. The case thus sent, and entered on the docket of Buncombe Superior Court, was regularly continued, until Spring Term, 1836, when the defendant went to trial, before his Honor *Judge Strange*, upon the issue joined on the record, as it then stood. In the course of the trial, the defendant relied, in part, on an *alibi*; and the solicitor of the state, in order to disprove it, introduced a witness, who

testified, that very early in the morning, after the offence was committed, a servant of the defendant obtained from a brother of his a pair of saddle-bags, and went off with them towards the defendant's house. This evidence was objected to by the defendant's counsel, and his Honor remarked that it was irrelevant, unless the defendant could be directly or circumstantially connected with the acts of the servant. It was then proved further, on the part of the state, that at a later hour of the same morning when the servant was seen with the saddle-bags, the defendant was seen with a pair of saddle-bags, on horse-back, going in a direction from home.

In his charge to the jury, the judge did not direct their attention to the circumstance of the saddle-bags, although it was relied upon in argument by the counsel for the state. The defendant was convicted, and moved for a new trial, because the judge had admitted the evidence in relation to the saddle-bags, and because he had not remarked upon that circumstance in his charge to the jury. The motion for a new trial being overruled, the defendant moved in arrest of judgment, upon the ground that the transcript sent from Rutherford had not been properly certified by the clerk of the Superior Court of that county. His Honor suspended the judgment for that term, and directed a *certiorari* to be issued to the clerk of Rutheford Superior Court, for a (37) more perfect record. At the next term of Buncombe Superior Court, to-wit, Fall Term, 1836, an unexceptionable transcript was returned from Rutherford, when, upon a motion for judgment, on behalf of the state, before his Honor *Judge Dick*, the defendant's counsel moved in arrest of the judgment, for the following reasons: 1st. On the ground that the Superior Court of Buncombe had no jurisdiction of the case at the term when the trial of the issue took place. 2dly. That the offence charged was not one at common law. 3dly. That the indictment did not charge malice against the owner of the property. These reasons were overruled, judgment pronounced, and the defendant appealed.

Pearson, for the defendant.
The Attorney-General for the state.

DANIEL, Judge, after stating the substance of the case, as above, proceeded. We see no ground for a new trial in this

case. The evidence objected to was admitted—and, as we think, correctly—to repel an allegation made by the defendant, of an *alibi*. And after the evidence was admitted by the court, the weight and effect of it was matter for the jury only; and it seems to us, that there was nothing left for the court to remark upon; especially, as no particular charge concerning this evidence was prayed by the defendant. We have examined the reasons in arrest, and concur in opinion with the judge who pronounced the judgment. 1st. The two detached pieces of paper writing purporting to be a transcript of the record, contained everything necessary to give Buncombe Superior Court jurisdiction: it contained the indictment, plea, and order of removal. In that shape it was entered on the state docket, and the defendant went to trial. From great caution, the judge suspended judgment the trial term, and sent a *certiorari* for such a record as could not be cavilled about. At the term judgment was rendered, the record was unexceptionable, and showed that the two pieces of paper which had been received as the record of the case, and
(38) on which the defendant had been tried, contained a true and complete transcript of the record when it was removed from Rutherford. So, when judgment was pronounced, the record showed that the case had been properly removed; and that Buncombe Superior Court had jurisdiction of the case, at the term the trial took place. The record being unexceptionable when judgment was prayed, there was nothing to restrain the judge from pronouncing it.

2ndly. This Court decided, in *State v. Simpson,* 9 N. C., 460, that an indictment for malicious mischief, which concluded at common law, was good. That decision was made in the year 1823, and since that time many convictions on indictments for malicious mischief, at common law, have taken place on the circuits of this state. In the year 1826, the legislature indirectly approved of the decision; for in the act limiting the time that indictments for misdemeanors should be brought, it is declared, that in all trespasses and other misdemeanors, except the offences of perjury, forgery, *malicious mischief*, and deceit, the prosecution shall commence within three years after the commission of the offence. After what has taken place, we think the period too late for us now to examine further into the question.

3dly. The objection is, that the indictment does not charge malice against the owner of the property. We have looked into the books of forms and precedents, and find that the form of this indictment corresponds with the form prescribed in the books. What evidence the state must produce to support such an indictment as this, we are not called on to decide. We think there is no ground either for a new trial or arrest of judgment; and this opinion will be certified to the Superior Court of law for the county of Buncombe, that it may proceed to final judgment in the case.

PER CURIAM. Judgment affirmed.

Cited: State v. Helms, 27 N. C., 365; *State v. Jackson,* 34 N. C., 331; *State v. Rash, Id.* 386; *State v. Latham,* 35 N. C., 35; *State v. Cardwell,* 44 N. C., 249; *Boykin v. Perry,* 49 N. C., 327; *State v. Manuel,* 72 N. C., 202; *State v. Caveness,* 78 N. C., 487; *State v. Hill,* 79 N. C., 658; *State v. Grady,* 83 N. C., 647; *State v. Harrison,* 104 N. C., 732.

(39)

JOHN RADFORD v. JESSE RICE.

1. It is not allowable to counsel, on a cross-examination, to put a question to a witness concerning any collateral fact, *not relevant to the issue,* for the purpose of disproving the truth of the expected answer by other witnesses. His answer to such a question must be taken as conclusive; and no evidence can be afterwards admitted to contradict it. But this rule does not apply to any inquiry respecting the fact in issue, or its attendant circumstances, or any facts immediately connected with the subject of inquiry.

2. A declaration made in the presence and hearing of a witness, and not contradicted by him, is proper to be submitted to the jury, as evidence that he acquiesced in and admitted the truth of such declaration; and if at variance with his testimony on the trial, may be used to impeach his credibility.

THIS was an action on the case, for slanderous words; to which the defendant put in the pleas of general issue and justification. The cause was tried at Yancey, on the last Circuit, before *Dick, J.,* when the plaintiff, in support of his action, introduced as a witness John Hinsley, Esq., who testified, that on a certain occasion, one Blackstork and himself,

as magistrates, tried a warrant, in which one James W. Patton was plaintiff, and the present defendant, Jesse Rice, was defendant: that John Radford, the present plaintiff, was examined as a witness for Patton, to prove the delivery of a side of sole leather, to Spencer Rice, a son of Jesse Rice: that Radford swore upon that trial, that he had on a certain occasion, engaged Jesse Rice to haul a load of corn for him to Asheville; and that Spencer Rice and himself went in company with the wagon: that Spencer Rice received from his father a small sum of money to pay Patton for some leather, which he had before bought, with directions to purchase another side of the same article, and to have it charged to him: that upon their getting to Asheville, Spencer Rice paid to Patton the money which his father had given him, and purchased a large side of sole leather, for his father, upon credit; which was rolled up and placed in the wagon: that he and Spencer Rice returned together with the wagon, until they came near the house of Jesse Rice, when Spencer parted with him, and drove off the wagon, with the leather in it, towards his father's. Hinsley further testified, that after Radford had given this statement, Jesse Rice immediately said, and repeated several times to Radford, "you have committed a wilful and corrupt perjury."

The defendant, Jesse Rice, relied upon his plea of justification: and in support of it, introduced as a witness, his son, Spencer Rice, who swore, that he went once, and only once, to Asheville, in company with the plaintiff Radford: that on that occasion he drove his father's wagon, which contained a load of corn, for Radford: that if any leather was purchased for his father at that time, he knew nothing of it: that Radford bought some leather at Patton's store, which was carried to his father's in the wagon, and Radford afterwards sent for it: that he saw Patton and Radford roll up the leather and put it in the wagon; and that there was only one bundle of leather put into the wagon. The witness was then asked by the plaintiff's counsel, whether he saw Mrs. Peggy Carter while he and Radford were returning from Asheville; to which he replied, that he did not recollect.

The plaintiff, to repel this evidence, and in further support of his action, introduced James W. Patton, the merchant who had sold the leather, who stated, that at a certain time,

the plaintiff and Spencer Rice came to his store in Asheville; that Radford introduced Spencer to him, as the son of Jesse Rice, and remarked, that Spencer had some money for him sent by his father; and that he wanted to get some sole leather for his father. Upon which, Spencer Rice paid him three dollars and fifty cents, which was placed to his father's credit; and that he then sold and delivered to Spencer Rice, for his father, a side of sole leather, which was charged to his father: and the witness, in confirmation of his statement, exhibited his day-book, which contained the original entries in his own hand-writing. The plaintiff then called Mrs. Peggy Carter, and asked her if she saw John Radford and Spencer Rice in company together on their return from Asheville. This question was objected by the defendant's counsel. (41) upon the ground that it tended to contradict Spencer Rice upon a collateral matter, as to which he had been examined by the plaintiff's counsel; but his Honor overruled the objection, because the answer of Spencer Rice to the plaintiff's counsel affirmed no fact; and therefore Mrs. Peggy Carter's answer to the question proposed to her could not contradict him. Mrs. Carter then stated, that she saw Radford and Spencer Rice on their return from Asheville; that the latter was driving the wagon, and the former was in it; that they called at her house, and asked for some water; that she went out to them, and saw a roll of leather in the wagon, when she remarked to Radford, that he had a fine roll of leather; upon which he replied, laying his hands upon it, that it was Jesse Rice's leather; that Spencer Rice was then sitting upon the saddle horse, and made no remark about the leather. This testimony was objected to by the defendant's counsel, because Jesse Rice was not present, when the conversation between the witness and Radford took place; but his Honor held, that if Spencer Rice heard the remark of Radford to Mrs. Carter, and made no reply, the evidence was proper for the purpose of discrediting him. The jury returned a verdict for the plaintiff; and the defendant appealed.

Devereux, for the defendant, contended, that the question proposed to Spencer Rice, by the plaintiff's counsel, was upon a collateral matter; and that the plaintiff could not, therefore, introduce another witness, to disprove his statement, for the

purpose of discrediting him; and referred to The Queen's Case, 6 Eng. Com. Law, 121; *Harris v. Tippett,* 2 Camp., 638; *Rex v. Watson,* 2 Starkie's Cas., 149; (3 Eng. Com. Law, 288).

W. A. Graham, and Battle, for the plaintiff, contended, that the cross-examination of the defendant's witness, Spencer Rice, was not upon a collateral point; and that he therefore might be contradicted; and they cited 1 Stark. Ev., 134; and *Rex v. Yewin,* in a note to 2 Camp., 638.

(42)

GASTON, Judge: The only questions proper for our consideration upon the case stated in this transcript, are those which arise upon the exceptions taken by the defendant. The sufficiency of the evidence to support the verdict, must be presumed, until the contrary be shown. It is not, therefore, open to the defendant here to object, that the words charged were not spoken *maliciously,* for that they were spoken in the course of a judicial trial and were pertinent to the matter then in controversy, because this objection does not appear to have been taken below; and we must understand, that so much only of the evidence is spread on the record, as is necessary to show the supposed errors specified in the exceptions. It is thought proper to make these observations, lest it might be supposed, that we have passed in any way upon a defence which was not made; but perhaps might have been urged at the trial.

The defendant's plea of justification put in issue the truth of the testimony rendered by the plaintiff on the trial of the warrant, before the magistrate. That testimony was, that on a particular occasion, when the defendant's son, Spencer Rice, accompanied the plaintiff to Patton's store, in Asheville, the said Spencer purchased, as agent for his father, and upon account of his father, a side of leather, which was delivered to him accordingly. The falsehood of this statement was endeavoured to be shown, by the testimony of Spencer Rice, who positively denied, that he purchased or received any leather for his father; and declared, that the only leather which he knew of as being obtained by any person on that occasion, was obtained by and delivered to Radford himself, the plaintiff in this action. This evidence went directly and

strongly to support the defendant's plea, and it was all important to the plaintiff to meet and repel it. For this purpose, he examined Mr. Patton, who sold and delivered the leather, and who swore that it was sold and delivered by him to the witness, Spencer, on account of his father; and in confirmation of this statement, exhibited his day-book, containing the original entry made by him, at the time of the transaction, wherein the article was debeted to the defendant. Further to contradict the defendant's witness, (43) and to repel the plea of justification, the plaintiff offered the testimony of a Mrs. Peggy Carter. On the cross-examination of the defendant's witness, he had been asked, whether, on his return with the plaintiff, from Asheville, he saw Mrs. Carter, and had answered, that he did not recollect, whether he had seen her, or not. She testified, that the plaintiff and the witness stopped near the house, when on their return from Asheville; the witness driving, and the plaintiff riding in the same wagon; that she carried water to the wagon; and on observing the leather, remarked to the plaintiff, that he had a fine roll of leather; and that the plaintiff, laying his hand on it, said, "this is Jesse Rice's leather." To the introduction of this testimony, two exceptions were made; first, for that it tended to contradict the witness, Spencer, on a *collateral* matter, whether he had or had not seen Mrs. Carter; and, secondly, for that what the plaintiff said was not evidence, inasmuch as it was not said in the defendant's presence. The judge admitted the testimony, and held, if Spencer Rice heard what was said, and made no reply, it was a circumstance proper to go to the jury, as tending to discredit him.

The first of these exceptions is founded on a misapprehension of the rule in relation to collateral facts. It is not allowable to counsel, on a cross-examination, to put a question to a witness concerning any collateral fact *not relevant to the issue,* for the purpose of disproving the truth of the expected answer, by other witnesses. His answer to such a question must be taken as conclusive; and no evidence can be afterwards admitted to contradict it. But this rule does not apply to any inquiry respecting the fact in issue, or its attendant circumstances, or any facts immediately connected with the subject of inquiry. The rule is founded on a consideration

of the extreme inconvenience which would result from rendering an inquiry which ought to be simple, and confined to the matter in issue, complicated and prolix, by causing it to branch out into an indefinite number of issues. But the matter respecting which Mrs. Carter was examined, im-
(44) mediately concerned the very transaction which was under investigation, and was, in truth, a part of that transaction itself. If her testimony contradicted that of the impeached witness, it contradicted his testimony upon the fact, whether the leather was delivered to him, as his father's or delivered unto the plaintiff, as the plaintiff's leather. So strictly has this rule been confined to questions irrelevant to the issue, that it has been held, that a witness may be asked, whether he has not said, that he would be revenged on the prisoner; and in case of denial, he may be contradicted. In such a case, the inquiry is deemed relevant to the issue, as showing the temper and disposition under which the witness has testified upon that issue. *Yewin's Case,* 2 Camp., 638, n; 1 Star., 164.

There is nothing also in the other exception. Beyond doubt, the testimony of the witness might be impeached, by showing facts inconsistent with it. Of that character was the fact deposed to by Mrs. Carter. Certainly, also it might be impeached, by proof of declarations made by him, at variance with his testimony. A declaration of another, in his presence and hearing, and not contradicted, is proper to be submitted to the jury, as evidence that he acquiesced in and admitted the truth of such declaration. The judgment is to be affirmed, with costs.

PER CURIAM. Judgment affirmed.

Cited: State v. McQueen, 46 N. C., 178; *State v. Sam,* 53 N. C., 162; *Keerans v. Brown,* 68 N. C., 45; *State v. Mills,* 91 N. C., 598; *State v. Morton,* 107 N. C., 894; *Burnett v. Rail Road,* 120 N. C., 519.

The President and Directors of the STATE BANK v. FREDERICK DAVENPORT, et al. Justices of Tyrrel County.

1. It is gross negligence, in the Justices of the County Court, to take from their clerk, as a bond, an instrument having no sum of money inserted in the body of it; and they will be liable therefor, as if they had taken no bond.

2. The Justices of the County Court may be proceeded against in a summary manner, under the act of 1819, (*Rev. ch. 1002,*) as the sureties of their clerk, for permitting him to officiate as clerk, without giving bond, as prescribed in the acts of 1790, (*Rev. ch. 327*); and 1809, (*Rev. ch. 777.*)

3. When a statute requires or directs a thing to be done in *a particular court*, as well as before a particular man, it cannot be done in or before any other. But where the subject-matter is within the jurisdiction of any court, an objection to the jurisdiction of the court over the particular parties, must be made by a plea in abatement, and is too late after a plea in bar.

4. Upon an issue joined, on the plea of *nil debent*, to a proceeding under a statute against certain persons, as the sureties of the clerk, for not paying over money received by him officially, a verdict, finding certain special facts—as that the money mentioned in the notice was paid to the clerk on a certain day, and was demanded, instead of finding specially all the facts on which the defendant's liability arose —or finding generally, that they owed the plaintiff, by reason of the matters set forth in the notice, the principal money demanded and assessed, and the interest, according to the statute—is defective.

THE plaintiffs, by their attorney, issued a notice 15 February, 1828, to the defendants, stating, that at the next term of the Superior Court for the county of Chowan, they would move the Court for judgment against the said defendants, as being the justices who were upon the bench of the County Court of Tyrrel, when Wilson B. Hodges was appointed clerk of said court, and was permitted to officiate as such, without having first given bond according to law, for a certain sum of money which had been collected by the sheriff of said county of Tyrrel, on an execution in favour of the plaintiffs, and paid by him into the clerk's office, while the said Hodges was officiating under the appointment aforesaid, which sum, the notice further stated, the defendants were bound to pay, and for which they were proceeded against as the securities to the said Hodges's clerk's-bond would have been, had he

given any, according to the act of assembly in such
(46) cases made and provided. Upon the return of this notice, the defendant's appeared, and put in the pleas of the "general issue," and "that there was no demand made previous to the service of the notice."

At October Term, 1828, of Chowan Superior Court, the case came on to be tried before his Honor *Judge Strange,* when it was proved, that the sum demanded by the plaintiffs was received by Hodges, in his official character as clerk of Tyrrel County Court, from the sheriff of the said county, it being the amount of an execution collected by the said sheriff, for the plaintiffs; and that the said money had been demanded of the said clerk by the plaintiffs' attorney, previous to issuing the notice. It was proved, by the records of Tyrrel County Court, that the defendants were the justices who were upon the bench when Hodges was appointed clerk; under which appointment he was acting, when the money in dispute was paid to him. The same records also stated, that a bond had been given by Hodges; but the bond which was produced, and which had accompanied the record, was defective, in having no sum whatever inserted in the body of it. The jury, upon this evidence, returned the following verdict: "that the money mentioned in the plaintiff's notice, was paid to the clerk of the County Court of Tyrrel, at July Term, 1827; and that a demand was made by the present plaintiffs, upon the said clerk, Wilson B. Hodges, previous to instituting this action."

Three objections were made by the counsel for the defendants, to the plaintiffs' recovery, viz.:

1st. That although no evidence was offered, as to the residence of either of the parties, yet that the court could *judicially* know, that the State Bank, being a corporation, could not have a residence anywhere; and that the Justices of Tyrrel could not live in Chowan; so that the Superior Court of Chowan could not have jurisdiction of the case.

2nd. That the same record which stated the fact, that the defendants were upon the bench, at the time of the clerk's appointment, proved that a bond had been given; therefore the plaintiffs could not, or if they could, had not shown, that the defendants had failed to take a bond.

(47) 3d. That the Act of 1819 (Rev., ch. 1002) only

gave the summary remedy against the sheriffs, clerks, and other officers, and their sureties, *eo nomine,* and did not extend to the justices, who, by the Acts of 1790 (Rev., ch. 327) and 1809 (Rev., ch. 777) were rendered liable to all the responsibilities there existing, and liable to be proceeded against, in the same manner that the sureties might then be, as a penalty for their neglect in taking no bond, pursuant to the duty of their office; and that the justices, not being mentioned in the act of 1819, giving the extraordinary remedy resorted to by the plaintiffs, could not be subjected in that way.

His Honor overruled these objections, and gave a judgment for the plaintiffs, for the sum demanded, with interest; and the defendants appealed.

Cameron, for the plaintiffs.
Badger, for the defendants.

RUFFIN, Chief Justice: The act of 1819, (Rev., ch. 1002) gives a creditor a summary remedy, by motion, triable at the first term, against a clerk, sheriff, and other officer, "and against any or all of his sureties." The act does not expressly give the same remedy against justices of the peace, who have rendered themselves responsible for the acts of the officer, by failing to take a bond from him, according to the provisions of the previous acts of 1809, (Rev., ch. 777) and 1790, (Rev., ch. 327). The counsel for the defendants, contends, upon this, that the justices are not liable, in this form of proceeding, because the words embrace only those who are not simply bound legally for the officer, but are bound also *in point of form,* as his sureties, by contract—especially, as the liability of the justices does not depend upon the mere fact of not taking such bond as the law requires, but arises only in cases of voluntary omission, or gross neglect. If the act deprived any party of a matter of defence, which he would have, if sued in a common law action, it could not embrace any persons, but such as are mentioned in it *nominatim.* But every bar to the recovery is open in the method of proceeding, as in any other; and the only difference (48) is, that the trial is to be at the first term, in order to render a judgment already recovered by a course of law, ef-

fectual. The defendants therefore, if their case had justified it, might have insisted, that they had honestly done their duty, to the best of their judgment. But it is clear, that such a defence would have been altogether unfounded. It is not like the case of the *Governor v. M'Affee,* 13 N. C., 15; for there a bond was taken, which was good at common law, though it did not conform to the statute, so as to authorize a summary remedy on it. But here, upon *non est factum,* what is called a bond of the clerk, must be found not to be a deed. It is so plain a case, as to amount to *crassa negligentia,* which proves not the defect of judgment, but the want of disposition in the justices to do their duty. If the defendants are thus clearly liable, the remaining question is, why should they not be summarily? They are grossly culpable, for not providing the public with a formal security; and have no pretence to object to this remedy, if their case be within the mischief, and within the intent of the act. It certainly falls within the mischief, which was the delay in paying over to the creditor his money, collected by the authority of the law; and that delay is equally mischievous, whether interposed by one set of persons bound for its payment, or by another set. But when we come to look at the acts of 1790 and 1809, they appear to be very strong. They not only make the justices liable for the officer, but they enact, that they "shall be *considered* bound to *all* intents and purposes," and are *declared to be* bound, as the sureties of the officer, in the same degree, and in the same manner, as though they had been *formally bound, "by entering into and executing bond with and as the sureties of such officer."* These provisions, we think, express the purpose of the legislature so clearly, that we cannot refuse to bring the justices within a subsequent beneficial and remedial statute, affording a speedy remedy against those who are liable as officers, and as the sureties of officers. That is the character given to statutes of this kind. *Oats*
(49) *v. Darden,* 5 N. C., 500.

Another objection is to the jurisdiction of the Superior Court of Chowan, as the plaintiffs did not reside in that county, and the defendants are officers and residents in another. We think the objection would be unanswerable, if it had been taken in proper time; but it is too late, after a plea in bar. It is insisted, however, that the same rule is to

be applied to summary proceedings in a court of record, as before an inferior court. We do not doubt, that if a statute requires or directs a thing to be done in a particular court, as well as before a particular man, it cannot be done in or before any other. 1 Plow., 206. But this act does not confer a special jurisdiction on any particular court. On the contrary, it gives the motion "in *any* court having competent jurisdiction;" which, we think, clearly refers to the subject-matter, as being within the jurisdiction of one or more courts, according to the general law. The subject-matter was within the jurisdiction of the Court of Chowan; though that court would not have exercised its jurisdiction between these particular parties, if it had been declined, by a plea in abatement. We think, therefore, the points made by the exceptions are in favour of the plaintiff.

Nevertheless, the court is constrained to reverse the judgment, and order a *venire de novo,* for a defect in the verdict. The defendants pleaded *nil debent,* and the jury have found certain special facts, that the money mentioned in the notice was paid to the clerk on a certain day, and was demanded, instead of finding specially all the facts on which the defendants' liability arose, or finding generally, that they owed the plaintiff, by reason of the matters set forth in the notice, the principal money demanded and assessed, and the interest, according to the statute.

PER CURIAM. Judgment reversed.

Cited: Guess v. Barbee, 28 N. C., 280.

(50)

ELI PUGH, et al. v. JOHN WHEELER, et al.

1. Where the erection of a mill on a stream causes the water to overflow the land or mill of a proprietor above, only when the stream is swollen, that circumstance will not excuse the party from damages altogether, but will only diminish the quantum of such damages.

2. Each owner of land, through which a stream, not navigable, flows, has a right, in consequence of such ownership, to apply the water on his own land to purposes of profit; and in making such application, he is at liberty, at all times, to avail himself of every advantage which his particular situation affords, respect being had to the rights of other proprietors, above and below him, on the same stream; and no other proprietor, either above or below him, can make any appropriation of the stream, so as to curtail or diminish his use of all his natural advantages, whether such appropriation were prior to his use, or not; unless, if such appropriation were prior, it was for such a length of time, as to raise the presumption of a grant.

3. If, on a petition for damages, caused by the erection of a mill, under the act of 1809, (*Rev. ch. 773,*) the jury return a verdict, assessing damages for more than one year before the filing of the petition, the court may correct it, by giving judgment for the damages of only one year previous.

4. In assessing damages under that act, the jury are not bound to give the damages at an average for the five years, but may assess different sums for different periods, during that time.

THIS was a petition, filed under the act of 1809, (Rev., ch. 773) for damages, which the plaintiffs alleged that they had sustained, by the erection of a mill and dam by the defendants. The suit was instituted 29 October, 1832, in the County Court of Guilford, from which it was carried by appeal, to the Superior Court, where it was tried, at bar, on the Fall Circuit of 1835, before his Honor *Judge Norwood.*

From the case made by the pleadings and evidence, it appeared, that the plaintiffs were the owners of a tract of land, situate on both sides of Deep river, in the county of Guilford, on which, prior to 1832, they had erected mills on one side of the stream. Below them, the defendants had also, prior to 1832, erected a mill, on the same stream. The lands of the parties were coterminous at the river; the defendants being next below the plaintiffs, and the line between them crossing the river, at the distance of fifty or sixty yards below the mill of the plaintiffs. There was evidence offered on each
(51) side on the trial, as to height to which the water was raised by the defendants' dam. The defendants in-

sisted, that, in the ordinary state of the river, the water was not thrown back above their own line; and to that effect they submitted evidence to the jury. The plaintiffs gave evidence of an opposite character, and also proved, that by reason of the obstruction by the defendants' dam, to the flow of the water, the stream was raised higher in freshets, and remained up longer than otherwise it would, and in that state overflowed in consequence thereof a portion of the plaintiff's land; and that the water was ponded back on the wheels of the plaintiff's mill, and impeded their running. The plaintiffs further gave evidence, that there was a fall of eight or twelve inches from the level of the water-wheel of their old mill to the level of the water in the stream at the point where the lands of the parties met; and that in order to avail themselves of the advantage of that fall, the plaintiffs, on 28 October, 1832, pulled down the old wheel, and put in a new one, set some inches lower than the former; so that the damages from the defendants' dam and pond became, thereafter, greater and more frequent than before.

The defendants' counsel, upon this evidence, moved the Court to instruct the jury, that if the defendants' had not ponded the water back beyond their own line at ordinary water, the plaintiffs could not recover damages for the overflowing of their land and mill-wheels in freshets, although such overflowing might be caused by the defendants' dam; and that they could not, at all events, recover, under those circumstances, for the injury to the mill, in its altered state, and with the new wheel; but only such damages as the plaintiffs sustained while their mill remained in the state it was in, when the defendants built their mill. These instructions were refused; and the court instructed the jury, that if the plaintiffs sustained any damages, before they lowered their wheel, in consequence of their land being overflowed, or their wheel obstructed sooner, or continuing longer, in a time of high water, by means of the defendants' dam ponding the river back in its swollen state, on the plaintiff's land
or wheels, the plaintiffs were entitled to recover such (52)
damages: and the Court further instructed the jury,
that the plaintiffs were also entitled to recover such increased damages as might have accrued to them since, and by reason that their wheel had been sunk, and that the defendants could

not lawfully prevent the plaintiffs from making the best possible use of their property.

The defendants' counsel further moved the court to instruct the jury, that if the plaintiffs had sustained no damages prior to their sinking their wheel, and deepening their canal, in October, 1832, they could not recover in this proceeding, because the act of Assembly gave the remedy only in those cases in which actual damages had existed for one year before the filing of the petition. The Court also refused to give this instruction; but instructed the jury to give to the plaintiffs such annual damages, if any, as they had sustained, by reason of the defendants' acts, before the plaintiffs altered their wheel, and also such annual damages as they had subsequently sustained thereby.

The jury found a verdict for the plaintiffs, and assessed their damages at twelve and a half cents *per annum,* from a day in the year 1830, to 28 October, 1832; and at ten dollars *per annum* from this last day.

The defendants' counsel moved for a new trial, for misdirection, which was overruled. They then moved in arrest of judgment, because the jury had assessed damages for more than one year before suit brought. This was also overruled; and the Court gave judgment for the plaintiff, for twelve and a half cents for the damages for the year preceding, and for ten dollars *per annum,* for five years next succeeding the filing of the petition; and the defendants appealed.

No counsel appeared for the defendants in this Court. *Mendenhall,* for the plaintiffs.

RUFFIN, Chief Justice, after stating the case, as above, proceeded: The point principally insisted on for the defendants is, that the plaintiffs could not recover for the injury to their new machinery. It has not been denied here,
(53) that a party cannot obstruct a stream below, so as to prevent the water from escaping, as it naturally would, and thereby pour it back upon the land or mill of another, simply, because those consequences do not exist at all times, ordinarily, but only when the stream is swollen. We think it clear, that circumstances can only affect the quantum of damage, and does not excuse the party altogether. One has the

right at *no* time to prevent the water flowing from the land of a proprietor above, as it has usually done, more than the proprietor above has the right to divert the stream, so as to prevent it from flowing to him below. The question, in any state of the stream, is, whether a person owning land on it, and thereby entitled to certain beneficial uses of the water, has been deprived, by means of the acts of another, of some of those uses which, but for those acts, he would enjoy in that particular state of the stream. If so, he has sustained some injury, and is entitled to recover the damages, although they be not so great, as if the injury were more frequent, or of longer duration.

The proposition of the defendants' counsel in this court, rests on the facts, that although the plaintiffs' mill might be older than the defendants', yet their improvements were subsequent to the erection of the defendants' mill; and, therefore, the defendants are not responsible for the inefficiency or inutility of those improvements. It is contended, that the application of the water of a stream to some particular and useful purpose, is an appropriation of it, which gives the right to the perpetual use of it in the same way, against all persons who may not have previously applied it to some other use inconsistent therewith. In other words, that running water is *publici juris*, and that the first use of it gives the better title to it.

There are *dicta* in the cases cited by the defendants' counsel, to give colour to his position, and we take the position itself to be strictly true, when the parties claim respectively upon their possession. He who claims a thing, because he has possessed or used it in a particular way, can claim to use it longer, in no other. The argument of the counsel, however, assumes, that the right to water can be acquired only by use; and therein, we think, consists its error. The (54) *dicta* on which he relies had reference to the cases of prescriptive title, or where the party had only the rights of a possessor. But it is not true, that the right to water is acquired only by its use, and that it cannot exist independent of any particular use of it. That doctrine is correctly applied to the air and to the sea, or such bodies of water, as from their immensity, cannot be appropriated by individuals, or ought to be kept as common highways for the constant uses of the coun-

try, and the enjoyment of all men. In such cases, particular persons cannot acquire a right—that is, a several and exclusive right, by use or any other means. But with smaller streams it is otherwise. They may still be *publici juris,* so far as to allow all persons to drink the water, and the like; and also, so far as to prevent a person to whose land it comes from thus consuming it entirely, by applying it to other purposes than those for which it is conceded to every one—*ad lavandum et potandum;* as to divert it or corrupt it. But while the use of running water in such streams is thus reserved to all men, for the purpose of preserving life and rendering existence comfortable, to only a very few is any other use reasonable; and as to those few only ought it therefore to be legal. Its use, for instance, in propelling machinery, cannot be obtained by any person, but one who owns the land which the water covers, or which forms its banks, or by one to whom such proprietor grants it; because it is physically impossible to get the water in any other way. But the owners of the land may have those uses of it; and as they are beneficial uses—beneficial, not only as sources of private gain, but therein also of public utility—it is reasonable, and ought therefore to be lawful, that the owners of the land should, as such, be entitled to the advantage of all those profitable uses of the water, which do not affect it as the aliment provided by nature to nourish animal life. We conceive, therefore, that it is the clear doctrine of the common law, that all the owners of land through which a stream, not navigable, runs, may apply it to the purposes of profit. The rights claimed
(55) by these defendants themselves have no other foundation. The only question, then is, what are the rights of the owners above and below on a stream, as against each other? The defendants say, that such one of the owners as may first apply the water to any particular purpose, gains thereby, and immediately, the exclusive right to that use of the water. That is true, in this sense, that any other proprietor, above or below, cannot do any act whereby that particular enjoyment would be impaired, without answering for the damages which are occasioned by the loss of the particular enjoyment. Whereas before the particular application of the water to that purpose, the damages would not have included that possible application of the water, but been confined to the

uses then subsisting. But to render the proposition even thus far true, the use supposed must be a legitimate one; that is, it must not interfere with any previously existing right in another proprietor; for usurpation does not justify itself. If one build a mill on a stream, and a person above divert the water, the owner of the mill may recover for the injury to the mill, although before he built he could only recover for the natural uses of the water, as needed for his family, his cattle, and irrigation. But if, instead of building a mill, he had diverted the stream itself, he cannot justify it against a proprietor below, upon the ground, that he had thus made an artificial use of the water, before the other had made any such application of it. The truth is, that every owner of land on a stream necessarily and at all times is using water running through it—if in no other manner, in the fertility it imparts to his land, and the increase in the value of it. There is therefore no prior or posterior in the use; for the land of each enjoyed it alike from the origin of the stream; and the priority of a particular new application or artificial use of the water does not therefore create the right to that use; but the existence or non-existence of that application at a particular time, measures the damages incurred by the wrongful act of another, in derogation of the general right to the use of the water, as it passes to, through, or from the land of the party complaining. The right is not founded in user, but is inherent in the ownership of the soil; and when a (56) title by use is set up against another proprietor, there must be an enjoyment for such a length of time as will be evidence of a grant, and thus constitute a title under the proprietor of the land.

These positions are explained with great learning, and laid down with marked precision, by Chief Justice Denman, in delivering the opinion of the Court of King's Bench, in the recent case of *Mason v. Hill*, Hilary Term, 1833, 5 Barn. & Adolph., 1. The court had in the previous year decided the same question in the same way between those parties. *Mason v. Hill*, 3 Barn. & Adolp., 304. The defendant erected a mill in 1818, and by means of a dam diverted some of the water that ran into the stream into a reservoir, for the use of his mill. In 1823, the plaintiff erected a mill on his own land and below, on the same stream; and 1828 pulled down the

dam of the defendant, by means of which the water had been diverted, and gave the defendant notice not to divert the water. But in 1829 the defendant built another dam, by which he cut off the water of several springs that formerly flowed into the stream, and the plaintiff brought his action. Upon the first trial, there was a verdict for the defendant; but a new trial was granted by the unanimous opinion of the court, delivered by *Lord Tenterden,* upon the ground, that the defendant could not by law acquire a right to the water by the prior use of it, unless the enjoyment was undisturbed for twenty years. Upon the next trial, the question was raised in the most solemn form, by special verdict, and elaborately discussed at the bar; and after time taken by the court, the judgment was in a masterly manner pronounced by *Chief Justice Denman.* Although there are *dicta* by some of the judges in the older cases, which seem to be against this principle, we believe there is no decision against it. In *Bealy v. Shaw,* 6 East, 208, the observation of *Mr. Justice LeBlanc* was not called for, and is not sanctioned by the other members of the court; and the decision is in accordance with the principle, that the owner of land through which a stream flows, may, whenever he applies it beneficially, maintain an
(57) action for diminishing that benefit, by diverting the stream above. *Lord Ellenborough* explicitly states the right of every man to have the advantage of a flow of water in his land, without diminution or alteration, unless the occupation of another has been for so long a time, as to raise the presumption of a grant. In *Williams v. Morland,* 2 Barn. & Cres., 910, there was no complaint that the defendant had diminished the quantity of water, or corrupted its quality, by building his dam, and thereby affected any use the plaintiff could enjoy. The declaration was for erecting a dam above, whereby the water ran in a different channel, and with greater violence, and injured the banks and premises of the plaintiff; which consequences the jury negatived by their verdict. It was therefore necessarily held, that the verdict was right; for the defendant had a right to stop the water, if it did no damage to the plaintiff, and he alleged but one manner of injury, and that was found against him in point of fact.

If such be the law, in reference to diverting a water course

above, so that a proprietor below is deprived of some of the uses of the water to which he may apply and is endeavouring to apply it, much more clearly is the proprietor above entitled to recover, when the water is obstructed below. In this last case, the owner above is not only deprived of the use of *the water,* to which he is entitled naturally, as well as others above or below him, but the water is thrown out of the natural channel, and by being raised, covers a part of *his soil,* which the natural current of the stream would not touch. Now, no person can, for the sake of giving himself a use of the water, justify throwing it back upon the land of another, so as to deprive him of *any* use of *his land,* whether for cultivation, the erection of machinery, or other buildings. Ponding water back on land above, seems to be so clear and direct an invasion of the proprietary interest in the land itself, independent of the right to use the water, as certainly to be a good cause of action, unless there be a grant of the easement; and if there be no grant in fact, the action must lie at all times at which the owner wishes to apply *his land* to a more beneficial purpose, unless he has permitted the other (58) to enjoy so long, as to amount to a grant in law. In *Saunders v. Newman,* 1 Barn. & Ald., 258, the plaintiff declared, as the possessor of a mill, and not as the owner of the land, that the water had been used to flow from it in its usual and natural channel, and that the defendant erected and kept a dam for a mill of his own below, whereby the water which ought to have flowed and escaped from the mill of the plaintiff, was prevented from escaping as it would otherwise have done, and was forced back against the wheel of his mill. The case, upon the trial, was, that the plaintiff's was an old mill of many years' standing; but that shortly before the suit, he erected a new wheel, of different dimensions from the old one, but upon the same level. The judge who presided at the trial, nonsuited the plaintiff, upon the ground that he declared upon his possession, and could only maintain the action, by a medium of proof, that if the old wheel had remained, the acts of the defendant would have injured him in that state; and that as he had thought proper to alter it, and make a wheel different from the old one, the evidence of his right was gone: but the whole court thought otherwise; and held, as the plaintiff had not stated his right to be in respect of a mill of a given

construction, that he was entitled to his action, as laid. For although the plaintiff declared on his possession only, yet that being for a long time, it gave him a right that the water should continue to flow to and from his mill, in the manner in which it had been accustomed to flow; and the owner was not bound to use the water in the same precise manner, or apply it to the same mill: if he were, that would stop all improvements in machinery. The court, indeed, add, that if the alterations prejudiced the lower mill, that would be different. But that is manifestly in reference to the limited right of the plaintiff as the possessor merely, which could only authorize the use of a particular quantity of water on a particular level. The particular point now before us was clearly stated and ruled by *Sir John Leach,* when Vice-chancellor, in *Wright v. Howard,* 1 Sim. & Stu., 190. He says, that the
(59) right to the use of water rests on clear and settled principles. *Prima facie,* the proprietor of each bank of a stream, is the proprietor of half the land covered by the stream; but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream; and consequently, one of them cannot use it, to the prejudice of any other. Without the consent of the other proprietors, who may be affected by his operations, no proprietor can either diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw back water upon the proprietors above. Every proprietor, who claims either of those rights, must, in order to maintain his claim, either prove an actual grant or license from the proprietor affected by his operations, or must prove an uninterrupted enjoyment of twenty years; which term of twenty years is now adopted, upon a principle of general convenience, as affording conclusive presumption of a grant. No action, he thought, would lie, for diverting or throwing back water, except by a person who sustains an actual injury; but *the action must lie at any time within twenty years, when the injury happens to arise in consequence of a new purpose of the party to avail himself of his common right.* The common right here spoken of is not that existing in all men, in respect of things *publici juris;* but that common to the proprietors of the land on the stream. And as between them, the use to which one is entitled is not that which he happens to get be-

fore another, but it is that which, by reason of his ownership of land on the stream, he can enjoy on his land, and as appurtenant to it. As that right is equal in each owner of the land, because naturally each can equally enjoy it, so one must exercise that right in himself, without disturbing any other, above or below, in his natural advantages; which natural advantages, as appurtenances to the soil, the other can insist on, at all times, until he shall have granted them away, or until here, as in England, a grant is presumed from enjoyment for twenty years. *Wilson v. Wilson,* 15 N. C., 154.

These principles and authorities sustain the opinion of his Honor, and are decisive against the defence set up. Both parties rest here upon their title as owners of the land, with the fact on the part of the defendants, that their (60) dam was erected, before the new purpose of the plaintiffs to avail themselves of all the fall in the stream by setting their wheel some inches lower. But it does not appear that the defendants' own mill is not newly erected; and there is therefore no ground for the presumption of a grant from the plaintiffs, or those under whom they claim.

We see no difficulty in the questions made under our statutes. The motion in arrest of judgment is answered by the terms of the judgment, which corrects the finding of damages for a longer period than one year before the suit brought; if that had been an error.

It is unnecessary to say, whether a petition would lie for damages altogether prospective, which is the case supposed in the instructions prayed; because here the jury have found some—small indeed—damages for the year preceding the action.

We think it follows necessarily, from the justice of the case, and from the provisions in the close of the first section, that the verdict shall be binding for five years from the filing of the petition, unless the damages should be increased by raising the water or otherwise, if the mills are kept up, that the legislature intended the jury to ascertain the actual damages, as far it could be done. Prospectively, it was from necessity to depend partly on conjecture; and the jury are allowed to assess for the five years at an average; but they are not obliged to do so. Suppose the defendants to take or let the mill go down pending the suit; he cannot be obliged to pay for the

whole time. So if the jury can see that more or less damages have arisen to the plaintiff at different times, they are at liberty to increase or diminish those found, accordingly. As was said, in *Gillet v. Jones,* 18 N. C., 339, the policy of the act makes it applicable to every case of an injury by the erection of a mill; but it does not create or abolish rights, but only relates to the remedy. Consequently, a verdict which finds the actual damages at different periods, is consistent with the objects of the statute, and constitutes the real justice
(61) between the parties, as to the whole time preceding the trial.

PER CURIAM. Judgment affirmed.

Cited: Williams v. Buchanan, 23 N. C., 540; *Gerenger v. Summers,* 24 N. C., 233; *Beatty v. Conner,* 34 N. C., 342; *Ingraham v. Hough,* 46 N. C., 42; *Johnston v. Roane,* 48 N. C., 524; *State v. Glenn,* 52 N. C., 334; *Burnett v. Nicholson,* 72 N. C., 335; *State v. Pool,* 74 N. C., 408; *Walton v. Mills,* 86 N. C., 282; *Goodson v. Mullen,* 92 N. C., 211; *McLaughlin v. M'f'g Co.,* 103 N. C., 107; *Wilhelm v. Burleyson,* 106 N. C., 389; *Adams v. Railroad,* 110 N. C., 330; *Geer v. Water Co.,* 127 N. C., 354; *Mullen v. Canal Co.,* 130 N. C., 502.

Den ex dem. ALFRED M. SLADE et al. v. JOHN M. NEAL et al.

1. Where a grant called for a "beginning at a pine *at the sound side,* and running thence *along the sound and marsh* S. 36° E. 220 poles to the head of a bay which makes out of the sound," it was *Held,* that the sound was the boundary; and that such a call could not be departed from to follow mere course and distance, under any circumstances.

2. The case of *Sandifer v. Foster,* 2 N. C. 237, approved.

This was an action of ejectment, tried at Tyrrel, on the last Spring Circuit, before his Honor *Judge Dick.* After the lessors of the plaintiff had made out their case, by producing a grant from the state, which covered the land in dispute, the defendant introduced and relied upon a grant from the state, of a prior date, which, he contended, also covered the disputed premises. His grant was for a tract of land lying in Tyrrel county, on Crotan Sound, "beginning at a pine at the sound side, Samuel Mann's corner tree, running thence along the

sound and marsh south thirty-six degrees, east two hundred and twenty poles, to the head of a bay that makes out of the sound," &c. The dispute was as to the proper location of this line; the lessors of the plaintiff contending, that it should be a straight line, according to the course and distance; in which event, the defendant's grant would not cover the land claimed by them; while the defendant insisted, that the line must run on the margin of the sound, in which case his grant would include the disputed land. The lessors of the plaintiff, in support of their position, produced in evidence a copy from the secretary of states' office, of the defendant's grant, with a plat annexed, in which the line aforesaid was represented as straight, and not according to the various courses of the sound; and they proved also its correspondence (62) with the course and distance mentioned in the grant. A verdict was rendered for the plaintiff's lessors, subject to the opinion of his Honor, who, not thinking them entitled to recover, directed a nonsuit; from which they appealed.

Heath, for the plaintiffs.

No counsel appeared for the defendants in this Court.

RUFFIN, Chief Justice. The patent describes the land as lying *on* Crotan Sound, and "beginning at a pine at *the sound side,* and running thence *along the sound and marsh,* south 36 degrees east two hundred and twenty poles," to another point, which is also on the sound. There is, therefore, a precise call for the sound, throughout the first line, from its commencement to its termination; and we deem it perfectly settled, that such a call cannot be departed from, to follow mere course and distance, under any circumstances. There are numerous cases, that the natural boundary called for, corrects and controls course and distance. *Sandifer v. Foster,* 2 N. C., 237, is the leading one; and in that, these same words, "thence *along* the river," carried a line half a mile beyond a white oak, called for as its termination, to the river, and then up the river, as it meandered, to the beginning, which was on the river. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Redmond v. Stepp, 100 N. C., 219.

(63)

JOHN B. THOMPSON, Admr. of MABURY PETTEWAY v. WILLIAM TODD.

1. The second proviso to the third section of the act of 1806, (*Rev. ch. 701,*) was prospective as well as retrospective in its operation; and slaves placed by parents in the possession of their children, since that act, and remaining in the possession of such children, until the death of their parents, intestate, are to be taken as advancements to the children.
2. The case of *Bull v. Brooks*, 7 N. C. 133, approved.

This was an action of Trover, for certain slaves, submitted to his Honor *Judge Saunders,* at Onslow, on the last Spring Circuit, upon the following case agreed:

Mabury Petteway, in the year 1823, made a parol gift of the slaves in controversy, to his daughter Matilda, the wife of the defendant, William Todd. The slaves were placed in the possession of Todd, who kept them for more than three years, and had them in possession at the time of the donor's death. Petteway died in 1834, intestate, and the plaintiff took out letters of administration upon his estate; demanded these slaves of the defendant, and, upon his refusal to deliver them up, brought this action. If his Honor should be of opinion, that the plaintiff was entitled to recover, a judgment was to be entered for him for seven hundred dollars, the value of the said slaves; if otherwise, a judgment of nonsuit was to be entered, with liberty to either party to appeal. Upon hearing the case, his Honor directed a nonsuit, and the plaintiff appealed.

No counsel appeared for the plaintiff in this Court.
J. H. Bryan, for the defendant.

RUFFIN, Chief Justice: The case of *Bull v. Brooks,* 7 N. C., 133, fixed the construction of the act of 1806, (Rev. ch. 701) so as to embrace cases of parol gifts to children, made subsequent to that act, as well as those made before. This was probably against the real intention at the time of passing the act; but it is too late now to revive the question.

(64) Upon the case agreed by the parties, the defendant is entitled to the slaves, as an advancement to his wife; and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

ANDREW WHITTINGTON v. LUCY WHITTINGTON.

1. A petition praying for a divorce *a vinculo matrimonii* only, will be dismissed, if the petitioner is not entitled to that relief, and upon being refused it, declines asking for any other; for a decree for a divorce *a mensa et thora*, even in a proper case for it, will never be made by the court, unless at the instance of the party.

2. Whether adultery committed by either party, during an agreed separation, would entitle the other to a divorce from bed and board, under the act of 1814, (*Rev. ch. 869,*) *Quære.* But whether it would, or not, it is certain, that the adultery of the wife, after an abandonment of her by her husband, would not entitle *him* to that relief.

3. An unreasonable delay by one party, after a probable knowledge of the criminal conduct of the other, will, if unaccounted for, preclude such party from obtaining a decree for a separation from bed and board.

4. Every objection which can be urged against a decree for a separation from bed and board, will apply with still stronger force against a decree for a dissolution of the marriage; and though a divorce *a mensa et thoro*, may be allowed in some instances to a person who is not entirely impeccable, who may not have been exemplary in all the attentions and stipulated offices assumed in contracting the marriage relation; yet the policy of the law, the interest of the offspring, the tranquility and happiness of families in general, forbid the dissolution of marriage, at the suit of a person to whom default in any of the essential duties of married life can be fairly imputed.

5. A petition for a divorce ought, as far as possible, to charge specifically the facts to be given in evidence. When open and promiscuous prostitution is the foundation of the libel, it may be sufficient to allege it in more general terms, because the charge is of a nature to admit of very general evidence; but when the petitioner relies on adultery committed with a particular person, or at a particular time, such person, time, and place, ought to be specially and plainly charged.

This was a Petition for a divorce, filed by the plaintiff, as husband, against the defendant, his wife, on account of the adultery of the wife.

The petition was filed 11 March, 1833, and stated, that the marriage took place in 1823, the petitioner (65) then being in his eighteenth year, and his wife about twelve years older. It then alleged, that the parties cohabited for about thirty days, when the wife went away, upon the pretence that the plaintiff did not feed her cattle well; and remained absent for two or three years; and during that time had issue, which the plaintiff believed to be his own: That when the petitioner came to full age, feeling the ties of pa-

ternal regard for his offspring, he prevailed on his wife to return to him and resume her duties—he promising to provide for her and her child to the utmost of his means, and to forgive her former offence of leaving him; and she engaging to discharge the duties of a wife and mother, and to treat her husband with tenderness and affection: that after the space of one month, or thereabout, the defendant disregarded her promises, and became so turbulent and neglectful of her domestic concerns, as to induce the plaintiff to fear, that she had no affection for him: that nevertheless, he being unwilling to destroy all anticipation of happiness, and to blight all the prospects of his child, bore with her negligence, contumely, and licentious course, using every means in his power to render her situation comfortable and respectable, until at length, he feared, and believed that his fear was well founded, that his wife had no attachment for him; and that she frequently left home for several days at a time, as the petitioner believed, for the express purpose of indulging in criminal intercourse.

The petition proceeded to state, that the petitioner, after learning the conduct of his wife, and from her unkind and cruel conduct towards him at home, could not reconcile it to himself longer to remain the companion and slave of a woman, who was so destitute of every virtue; and he discarded her from his embraces as a husband: and the petition then charged, that the petitioner had been informed, and so was the fact, that the defendant had indulged in criminal intercourse with both whites and mulattoes: that she acted in this abandoned character for some time before it came to the ears of the petitioner; and that she had three illegitimate children, one of which was a coloured child, as the petitioner was informed and believed: that a few months before the filing of
(66) this petition, she lived in a state of adultery with one ——— Watson; and was then living in adultery with one Ned Goings; and, finally, that these facts had existed for more than six months before the filing of the petition: upon which premises, the prayer was for a divorce of the petitioner and the defendant from the bonds of matrimony. To the petition was annexed the usual affidavit.

The answer admitted the marriage, about the time charged in the petition; and stated that the parties cohabited for several weeks thereafter, when the husband, without the slight-

est reason, accused the defendant of having unlawful intercourse with a negro slave; and, indignant at the calumny, that she thereupon left him, and resided in the house of her mother: that in the course of two months, the petitioner prevailed on the defendant and her mother to let him live with them, and he did so for a short time; and that then the parties removed to a house of their own, and lived together for two or three months: that at that place, and when her first child was three weeks old, the plaintiff whipped the defendant cruelly; upon which she left him a second time, and returned to her mother: that during this residence with her mother, the plaintiff laid in wait for her, and beat her so severely, as to endanger her life: that as soon as she recovered sufficiently, she procured a small piece of land, and a house in which she lived by herself, striving to maintain herself and her child, by her own labour: that the petitioner, in a very short time after she got a house, visited her there, and professed great penitence for his previous conduct, and promised amendment; which induced her again to cohabit with him: that he acted kindly towards her as long as her stock of provisions lasted, but as soon as they were exhausted, and it became necessary for him to labour for a living, he became unkind and quarrelsome: and finally, that about six years before this suit was commenced, he abandoned her and her house, and had not returned since; and she had supported herself and her children.

The answer then admitted, that the defendant had had three children, since her husband abandoned her (67) the last time; but said, that two of them were twins, and were born within five months after he left her, and that the third, then—November, 1833—at the breast, was the offspring of intercourse between these parties; and that during their separation of six years, the petitioner had frequently called at her house, and staid all night with her. The answer then affirmed, that the charge made against her in the petition, of illicit and indiscriminate intercourse with whites and blacks, was untrue; and that there never had been any accusation of improper conduct, or illicit intercourse with any man, made against her by any person but one, and that was by the incitement of her husband.

Upon issues made up and submitted to a jury, a verdict

was found, that the petitioner was a citizen of this state for three years before the filing of the petition; that the defendant had not been guilty of adultery before the final separation from the petitioner; that she had been guilty of adultery six months before the filing of the petition; and that the petitioner had not been guilty of adultery, nor admitted his said wife into conjugal society since he knew of her adultery, nor had he allowed of her prostitution, nor exposed her to lewd company.

Upon these findings, the petitioner moved for a divorce *a vinculo matrimonii,* as prayed in the petition, but his Honor *Judge Donnell,* of Caswell, on the last Spring Circuit, pronounced against the same, upon the ground that no act of adultery was found to have been committed by the wife, until the husband, as stated in the petition, had "discarded her from his embraces as a husband," and they had finally separated. The plaintiff thereupon declined asking any other decree, and the court dismissed the petition; upon which the plaintiff appealed.

W. A. Graham, for the plaintiff.
Iredell, for the defendant.

RUFFIN, Chief Justice, having stated the case as above, proceeded: The decree in the Superior Court appears to us to have been required by our statutes concerning di-
(68) vorces; and the particular ground on which it is placed to be in accordance with the principles of sound policy and public morals.

If the case were a proper one for relief of a different kind from that which the plaintiff asked, he cannot complain that it was not granted, but that his petition was dismissed. In the first place the prayer of the libel is specifically for a dissolution of the marriage, and for that only. In the next, he refused at the trial to accept any decree, but that deemed by himself, most favourable to him. A decree, even for a separation only, will never be made by the court, unless at the instance of the party, although the parties be in fact separated, and there be other matter apparent, on which a sentence of legal separation might be founded. If they can be reconciled, it may prevent further scandal—in

which the public is much concerned; and may also prevent further violations of moral duty by the offending party. Hence, though there is no jurisdiction here to decree a restitution of conjugal rights, the court reluctantly widens the breach between persons already separated, and cannot become active to that end by giving its authority for future separation, but when urged to it by a party as a matter of strict right. For each of these reasons, the petition was properly dismissed, unless the plaintiff be entitled to have the marriage dissolved. We think he is not; and indeed, upon the whole case, as it appears affirmatively, or as it must be taken from the defect of the allegations and proofs on his part, the plaintiff is precluded from any relief whatever, however explicit soever his prayer or motion for it might have been.

The first infraction of the matrimonial contract was on the part of the husband. He not only separated from his wife, but he adandoned and maliciously deserted her—leaving her, as far as we see, unprovided for, and, at the same time, as we do see by his own admission, untruly imputing to her the scandalous and immoral breach of her vow of fidelity. Upon the credit of the verdict, the wife, up to that period was innocent. By the same authority, her guilt subsequently is established. There have been but few divorce causes in the (69) courts of this State; and it has not yet been laid down, what is to be the effect of a separation of the parties by agreement, yielding to each of them a freedom of volition, and corresponding action, independent of the other, more or less ample, on the application of one of them for relief, on account of adultery committed by the other during the separation. It is obvious, however, to any reader, that the cases within the contemplation of the legislature of 1814, (see acts of 1814, Rev. ch. 869) are those in which the party asking for relief has lost conjugal society by the act alleged as the gravamen of the complaint on which a divorce of either kind is sought. In the first section, the court is authorized, in its discretion, to grant a divorce of the one kind or the other to the injured person, "where either party has separated him or herself from the other, and is living in adultery." These words, plainly, do not embrace the case of adultery by one, who, against his or her will, has been abandoned by the other. Nor do they seem fairly to embrace the case where a like

offence has been committed during a separation by mutual consent. The court does not mean it to be supposed, that such separations, unless under very unlimited terms—importing almost total free agency—amount in themselves to licenses to either party, as against the other, to commit adultery. One effect of such unchastity on the part of the wife would, doubtless, be, to repel her application for a divorce *a mensa et thoro,* or to be alimented, under the fifth section of the act: for although such separation be mutually injurious, yet the duty remains with each to become reconciled, and the wife ought not to render herself unworthy of reconciliation, and put it out of their power to come together again, without producing the degradation of the husband. It is, however, a very different question, whether adultery, pending a separation by agreement, ought to found a decree that the parties should be divorced from bed and board—that is, to legalize and enjoin a continuance of the separation, and thereby, to a certain extent, to tempt the frail party to other lapses of the same kind.

(70) It is the tendency of separation to betray the parties into guilt. Besides the effect of marital cohabitation on the passions, the presence of each is a protection to the other. It is true, the jury has here found, that the husband did not allow his wife's prostitution, nor expose her to lewd company. In the sense that he did not give actual consent to any particular act, or that he did not intend the contamination of his wife's principles altogether, that may be a correct finding; but it is undeniable, that long—apparently indefinite and total—separation by agreement, do expose the parties to the most dangerous trials: so hazardous, that a result adverse to the purity of the one and to the honour of the other ought not to surprise any body, nor be deemed unexpected nor undesired by the parties themselves. We have the highest authority for the precept, "that whosoever shall put away his wife, saving for the cause of fornication, *causeth* her to commit adultery;" which is not more obligatory as an injunction of revealed religion, than it is just and true as a proposition in the philosophy of the human mind and heart. We should doubt extremely, therefore, whether—regard being had to the public morals, and the words of our statute being kept in mind—adultery, committed during the subsistence of an agreed separation, would found a decree for a divorce from

bed and board. It is true the agreement is not obligatory; at least not so that a court will decree upon it. In England it is disregarded as an authority for a separation; and the ecclesiastical courts, notwithstanding such an agreement, decrees upon the application of either party, a restitution of conjugal rights. A separation, under such a contract, may not, for that reason, have the same effect there as it should here; because there either party may compel the other to resume the marital duties, at least to the extent of conversation and society. But here there is no power to bring the parties together; and therefore we ought to make the consequences of a voluntary separation as penal as possible to each, by denying relief to one for any conduct of the other during the separation, that has probably arisen out of it.

But if adultery committed under such circumstances would be a ground for a divorce from bed and board (71) yet adultery consequent upon the desertion, or, to use the phraseology of the statute, the abandonment of the wife and family by the husband, especially under the circumstances in this case, would certainly not be. A divorce of either kind may be granted within the words of the first section of the act on the same state of facts. It is to be granted to the party injured against a person who has separated him or herself *from the other and is living* in adultery. Both facts must concur; that is, the fault of separation and the fault of adultery must be on the same side. When, therefore, a husband abandons his wife, and especially, leaves her destitute and with her character tarnished by his own unfounded aspersions, he cannot be looked upon as an injured person within the act. There was too much reason to suppose that he might contemplate the very case that has here happened, for the legislature to authorize relief to him.

There are also other grounds upon which the plaintiff is barred of any decree. The petition does not specially charge any adulterous connexions but two: one existing at the time the suit was brought; and the other, "a few months before." The verdict is yet less precise, and says only, in the words of the statute, that the wife was guilty six months before the suit. There are, however, other allegations in the libel, which we must take to be true, as against the petitioner, from which it is a necessary inference, that the conduct of the wife was

grossly lewd, and her prostitution long and notoriously infamous. The petition states the residences of the parties to be in the adjoining counties of Caswell and Guilford; that, besides the child supposed by the petitioner to be legitimate, the wife had three other children, all of whom the husband disowns, and one of whom is a mulatto; all born after the marital cohabitation of these parties had terminated. The answer, indeed states, that the separation, during which these incidents occurred, preceded this suit six years. There is no finding of the jury upon this point; and we cannot take the time from the answer. But it is necessarily certain, from the nature of things, that facts decisive of the wife's guilt,
(72) previously suspected by the husband, must have happened several years before complaint was made. The plaintiff says, "that she acted in this abandoned character for some time before it came to his ears." But he does not specify the time at which he heard it, nor offer evidence of it; nor in any manner account for his making no inquiries into his wife's conduct, or for the delay to vindicate his honour after the "damning proofs" did come to his knowledge and that of the community. A divorce from bed and board is only a decree for separation, intended to relieve the injured party from the society of an impure and faithless partner, and, if founded on the adultery of the wife, to exonerate the husband, unless there be a reconciliation, from the charge of the wife's maintenance. It proceeds on the idea that there is no moral taint on the one side, but a just sensibility to violated honour, as well as to the invasion of legal right. The law will not be active to protect a husband from his wife, if his acts have been conducive to her turpitude, or if his conduct evince indifference on his part to her profligacy, in its inception or progress. This principle has been long acted on in the courts of other countries, which have jurisdiction in cases of divorce; and seems to be assumed by, if not expressly incorporated in, the act of 1814; for the cases of the allowance, or the procurement of the wife's guilt, and of forgiveness by either party, the third section, in terms provides: so, also, of the exposure of the wife to improper associations. Long delay to complain of an injury of this kind, after probable knowledge of the "criminal fact," is so little to be expected, that every one must be surprized and shocked at it,

unless it can be explained. But when a wife openly prostitutes herself through a period of several years, in the neighborhood of her husband, and he makes no inquiry, does not interpose, nor even utter a murmur, we are obliged at once to pronounce such conduct incapable of explanation. The delay must arise either from interested motives, or from a deadness of feeling that no injury can rouse. It implies a license to the wife, so far as his rights and honour are involved, to act as she pleases; and amounts, by fair intendment, and constructively, to condonation. Total inactivity and (73) profound silence under such circumstances, are a pardon. He did not feel the injury, and therefore he did not and cannot *complain*. A failure to complain at the proper time, ought to preclude him from doing so afterwards. That such is the true interpretation of the provisions of the third section, is further to be inferred from those of the sixth section. That enacts, in order "to guard against the heat of momentary passion, and afford time for reflection and opportunity for reconciliation," that no suit shall be brought until *after* the lapse of at least six months from the fact laid as the ground of it. This is a limitation of an unusual character. It prohibits suit within a particular period; while all others require the action to be brought within a certain time, and not after. The difference arises out of the nature of this injury, as contradistinguished from all others. An application for a divorce on a stale case, was not, and could never be expected. The danger was that there would be an immediate appeal—in a "moment," to the law. The legislature interposes therefore, not to hasten, but to retard the application for legal redress, for the sake of protecting the parties and their families from the consequences of sudden and high excitement. A period within which suit must be commenced, is not prescribed by the act, because the very nature of the grievance, if really existing in *invito*, and of the redress, sufficiently stimulate to diligence, and delay is really inconsistent with the existence and just sense of the injury. The suit need not indeed be commenced *eo instanti* that the six months expire, for as a precise bar, no time is fixed; but a greater delay, notwithstanding the words "at least," is not required, and ought to be accounted for. It is not excused, especially in the husband, when, from its length and other circumstances, it is apparent

that it did not arise out of nor have reference to any of those reasons for delay contemplated by the legislature. Suit ought to be brought within so short a time, as reasonably to show that the party is smarting under, and acting on the wrong itself, and a proper sense of it; and that he has not
(74) acquiesced until he finds it necessary to justify himself to others, or becomes desirous of a divorce for some other ulterior purpose. Such long and gross negligence and settled indifference to his wife's conduct, and to the subsistence of the connexion between them, notwithstanding such conduct, are tantamount to connivance, if they do not plainly denote it. They show, at the least, that the complaint is *not* made "in sincerity and truth *for the causes* mentioned in the libel," but for other reasons.

Still weaker are the claims of this petitioner to a dissolution of the marriage. Every reason for requiring active diligence in preferring an application for a divorce *a mensa et thoro,* and for rejecting it, when preferred upon any of the demerits of the applicant which have been mentioned, increases, and greatly increases in strength, when the court is asked to annul the contract. The statute, indeed, alters the common law so far as to declare marriage dissoluble; but it is not absolutely enacted that it shall be dissolved for every act of adultery, nor even in any case of adultery. The authority is given to the court to decree its dissolution, or a separation, at the discretion of the court, when a party separates him or herself from the other, and is living in adultery. This does not mean an arbitrary discretion, but a sound and judicial one, founded on some reasonable and fixed principles. There must necessarily, therefore, be some distinction between cases in which a party is *entitled* to a divorce from the bonds of matrimony, and those in which the party can properly ask only to be protected from the society of the impure and unchaste. Although a divorce *a mensa et thoro* may be allowed in some instances to a person who is not entirely impeccable, who may not have been exemplary in all the attentions and stipulated offices assumed in contracting this relation, yet the policy of the law, the interest of the offspring, the tranquility and happiness of families in general, forbid the dissolution of marriage, at the suit of a person to whom default in any of the essential duties of married life can be fairly imputed. This

distinction arises out of the provision vesting a discretion in the court. It seems to be a sound one, and that it ought always to be kept in view. The motive for (75) seeking a dissolution of marriage may often be the most powerful that can prompt human action, or excite human desires. It may not arise out of the guilt of the one party, so much as out of the indifference or disgust of the other or the wish to form a new connexion. The attempt is to be watched closely, and the relief guarded narrowly. When therefore, persons who have entered into the marriage state, and in doing so have solemnly engaged to each other their society, their mutual advice and kindness, and personal good offices during life, and their assistance in the nurture and education of their offspring, shall violate these engagements, in the fulfilment of which the common interests of society are so deeply involved; when each shall renounce the obligations assumed on his or her part, and affect to release those of the other party by a dissolution *de facto* of the marriage, in the form of a separation by agreement, it seems to us, that such persons cannot ask of the country, whose most wholesome institution is thus abused and despised, to carry their unlawful agreement more completely into effect by judicial sentence, freeing them from each other, by reason of any conduct supervening their own renunciation of their claims on each other. As the statute makes no provision for a divorce for any cause except impotency, existing before their cohabitation commenced, so it seems to contemplate the continuance of the cohabitation, up to the time of the guilty act on which the divorce is to be founded. If, indeed, the husband drive away his wife, or abandon her, and become addicted to a course of gross licentiousness, the motive for his original acts may be seen in his subsequent ones, so as to connect the whole together; but where the separation is voluntary on both sides, or fully assented to, each violates the great duty of affording to the other conjugal society, and withdraws the restraints and correctives which such society creates. *They* separate from *each other;* and not *one* of them *"from the other;"* as the act expresses it. Now, the divorce from the bonds of matrimony is not to be granted merely because one or both of the parties wish it. It ought to be granted only in the extreme (76) case, where the conduct of one party is such that they

ought not and cannot live together, and the other party has been, and was, up to the time of the conduct complained of, willing and ready, and proceeding in the performance of the duties appropriate to that party. It is not simply a cause between the parties to the record; the country is also a party, and its best interests are at stake. The very lapse insisted on might not, and probably never would have occurred, if the party had been present to guard that innocence which has been betrayed by temptation let in by the absence of that party. But in this case the husband threw his wife from him—"discarded her from his embraces." He seems to have waited for her pollution to be thorough and shameless, and her profligacy matured, under his neglect and aspersions. He withheld the most powerful inducements to his wife to preserve her innocence, or to reform her life: he withheld the complaint of her conduct as a grievance to him, so long, as to create a presumption that he did not heretofore feel that conduct to be a grievance, and does not now feel his marriage to be so, in itself, but only as it may stand in the way of his forming a new and more agreeable or advantageous match. It would be of most dangerous example to put a husband thus acting into a condition that might enable him to do so. What damages would a jury give this husband in an action for the seduction of his wife under such circumstances?

The Court has disposed of the questions made at the bar on this case, as if they arose upon the pleadings and verdict in the record. We cannot, however, omit to avail ourselves of the opportunity of saying, that the petition fails entirely to put in issue the adultery of the wife before the separation, and does so, in respect to that occurring afterwards, very vaguely, except that subsisting at the time of filing the petition. It ought, as far as possible, to charge specifically the facts to be given in evidence. When open and promiscuous prostitution is the foundation of the libel, it may be sufficient to allege it in more general terms, because the charge is of a nature to admit very general evidence; but even then, (77) time, place and circumstances may be material, as indicating to the court, the propriety of granting or refusing the relief, according to the conduct of the husband. In the ecclesiastical courts of England, the course is to require the libel to state a perfect case for a divorce, before it is ad-

mitted to proof; so that it can never be helped out by the evidence. This is probably the true meaning of the provision in our statute, which requires the petition to be exhibited in term time, or to a judge in vacation, at least thirty days before the next term, that he may allow it, if sufficient on its face, or disallow it, if insufficient, to be filed and proceeded on. At any rate, when the plaintiff relies on adultery committed with a particular person, or at a particular time, such person, time and place ought to be specially and plainly charged; and not after the method of this petition; which states the belief of the petitioner, that his wife left home, "for the purpose of indulging in criminal intercourse;" and that he "has been informed that she indulged in criminal intercourse with both whites and mulattoes." It is the more material to observe precision in this respect, because the act of 1827 authorizes an appeal in every case to this Court, which is confined "to the facts ascertained in the Superior Court;" and no facts can be ascertained but such as are charged by one of the parties. The charges ought therefore to be in legal language, and to be articulate and certain as to acts, persons, times and places. The statute uses the emphatic words, "setting forth therein *particularly and especially* the causes of the complaint."

PER CURIAM. Judgment affirmed.

Cited: Moss v. Moss, 24 N. C., 57; *Wood v. Wood,* 27 N. C., 680; *Everton v. Everton,* 50 N. C., 207; *Earp v. Earp,* 54 N. C., 243; *Schonwald v. Schonwald,* 62 N. C., 220; *Little v. Little,* 63 N. C., 23; *Tew v. Tew,* 80 N. C., 318; *McQueen v. McQueen,* 82 N. C., 473; *Steel v. Steel,* 104 N. C., 635; *Ladd v. Ladd,* 121 N. C., 121; *Setzer v. Setzer,* 128 N. C., 172; *House v. House,* 131 N. C., 142.

(78)

NATHAN EASON v. DANIEL DIXON.

An assignment for value by endorsement of a constable's receipt, amounts to but a *guaranty*, and the guarantee cannot recover of his guarantor, without showing that he has used proper diligence in endeavoring to collect the claim mentioned in the receipt, either of the person from whom it is owing, or from the constable who received it for collection.

This was an action of assumpsit, tried at Onslow, on the last Spring Circuit, before *Saunders, J.* The case appeared to be as follows: One Hadnot, a constable, had given the defendant a receipt for a note on one French, for twenty-five dollars, and interest, to collect or return. The defendant endorsed this receipt to the plaintiff in these words, "pay the within to Nathan Eason.—Daniel Dixon." The plaintiff then gave up to the defendant a note which he held against him, as a consideration for the said endorsement. The plaintiff warranted the defendant for so much money due by receipt, and proved the foregoing case. The defendant contended, that at most the endorsement was but a *guaranty* of the debt due from French. His Honor told the jury, that if the plaintiff gave value for the paper, and there was nothing to restrict or qualify the defendant's engagement at the time of his endorsing, it was such an original undertaking, as would enable the plaintiff to recover. There was a verdict and judgment for the plaintiff, and the defendant appealed.

No counsel appeared for the defendant in this Court.
J. H. Bryan, for the plaintiff.

DANIEL, Judge, having stated the case as above, proceeded: We are of the opinion, that the indorsement on this unnegotiable receipt did not amount to more than a *guaranty;* and if so, that the guarantee, was bound to use such diligence to collect the debt of French or the constable, as a prudent and discreet man would under like circumstances, to collect his own debt: and, unless after using such diligence, he failed to obtain satisfaction of the principal, he could not resort to the guarantor. *Towns v. Farrar,* 9 N. C., 163. The
(79) guaranty made by an endorser is a conditional one. *Williams v. Collins,* 6 N. C., 47; S. C. 4 N. C., 382. The plaintiff did not show that he had used diligence to

collect the debt mentioned in the receipt. The judge thought that he could recover without any evidence showing an effort on his part to get the money. In this we think he erred; and there must be a new trial.

PER CURIAM. Judgment reversed.

NORMAN McKINNON v. JOHN McLEAN and THOMAS J. CURTIS.

1. The act of 1829, c. 20, differs from the act of 1820, (*Rev. ch. 1037,*) in that the latter makes deeds in trust void, unless registered within six months; and there is nothing in it to denote that anything short of a complete registration, by fully transcribing the instrument into the books of the register, is to be a registration, or constitute part of it; but the former does not avoid a deed of trust for want of registration at any particular time, but declares that it shall not operate "but from" the registration; and that is deemed to be done on the day of its delivery to the register, as noted by him on the deed.

2. Schedules annexed to a deed in trust, and referred to therein, are parts thereof, and must be registered; but such registration will be taken as having been made on the day when the deed itself is deemed to have been registered.

3. A deed in trust admitted to registration upon a probate by an incompetent witness, is not therefore void for want of probate and registration, but will be received in evidence on a trial, if it be then proved by competent testimony.

This was an action of trespass *vi et armis,* brought by the plaintiff to recover damages from the defendants, for taking the property of the plaintiff, tried at Cumberland, on the last Circuit, before *Saunders J.* After a verdict and judgment for the defendants, and an appeal by the plaintiff, a case agreed, of which the following were the material facts, was made up for the Supreme Court. The plaintiff was in possession of the property taken, at the time of the taking by the defendants, but it appearing that Henry Horn had been the owner of the property prior to the 4th of (80) September, 1835, it became necessary for the plaintiff to show that he had acquired the property from the said Horn. For that purpose, he offered in evidence a deed, with two schedules, marked A, and B, annexed thereto, and referred to therein, executed by Horn to the plaintiff, in trust for the payment of Horn's debts. To this deed there were two sub-

scribing witnesses, one of whom, S. W. Murley, was a creditor of the grantor, and whose debt was intended to be secured by the trust. Upon the deed was endorsed a certificate of its probate by this witness, before the clerk of the County Court of Cumberland, and an order for its registration, dated 4 September, 1835. There was also an endorsement by the register, that the deed "came to hand for registration at 3 o'clock P. M., 4 Sept., 1835;" and a further endorsement by the same officer of a copy of the certificate of registration in the following words:—"7 Sept., 1835. The foregoing deed, together with the schedules marked A and B annexed thereto, came to hand for registration at 3 o'clock P. M., 4 Sept. The deed was registered in book 2, No. 2, page 244, on 6 Sept. The schedules were registered on 7 Sept., 1835." The defendants objected to the probate, and opposed the admission of the deed, on the ground that the witness was interested, and therefore incompetent. The plaintiff contended that the probate had been passed upon by competent authority, was *res adjudicata*, and conclusive on that trial. The other subscribing witness was then called for the plaintiff, and proved that the deed was duly executed and delivered on the day it bore date, and that he and Murley subscribed it as witnesses; and the court upon this permitted the deed to be given in evidence. The defendants then gave in evidence a judgment obtained in the County Court of Cumberland, in favour of Thomas Irwin & Co. v. Henry Horn, which was rendered on *Tuesday, the eighth* day of September, 1835, being the second of the term. On that judgment a writ of *fi. fa.* bearing *teste* the first Monday of September, 1835, that being the first day of the
(81) term of the court aforesaid, and the 7th of the month, was issued to the sheriff of said county. This writ was issued 5 Oct., 1835, and on that day came to the hands of the defendant M'Lean, who was then the sheriff of the county. It was issued at the instance of the other defendant, Curtis, who was the agent of Irwin & Co.; and under that writ the said sheriff, assisted by Curtis, took from the plaintiff the property which he claimed, and of which he was possessed, under the deed in trust aforesaid—the property so taken being a part of the personal chattels listed and described in the schedule A, annexed to said deed. The defendants alleged that the deed in trust was operative only from its reg-

istration, which they contended was on 7 Sept., and that the *fi. fa.* bore *teste* on the same day, and was a lien on the property attempted to be transferred by the said deed, and that they were therefore justified in taking the property from the plaintiff:—and of this opinion was his Honor, and so instructed the jury.

The plaintiff requested his Honor to charge the jury, that the certificate of registration showed that the deed had been registered 6 Sept., 1835, and that if they believed the certificate, the registration was prior to the teste of the *fi. fa.;* which instruction was refused. The plaintiff then requested the court to instruct the jury, that although the *schedules annexed* to the deed, were referred to in it, yet they were not parts of the deeds, and the registration of the schedules was not required by law; which was also refused. The plaintiff then requested the court to instruct the jury, that if the registration was not complete until 7 Sept., 1835, neither a judgment rendered on the 8th day of that month, nor an execution issued on that judgment could relate back to the first day of the term of the court, so as to defeat a *bona fide* purchaser or assignee; which instruction was also refused. His Honor was also requested by the plaintiff to charge the jury, that if the execution could relate back to the first day of the term, there was a *prius and posterius* in every day, and that the registration was completed before the rendering of the said judgment, and before the issuing of the said execution, and (82) before the *teste* thereof; but this instruction was also refused. The *bona fide* execution of the deed in trust, and the due delivery thereof, were not denied by the defendants, but they relied on the aforesaid judgment, and writ of *fi. fa.* in justification of their taking the property in question.

Under the advice of his Honor it was agreed by the parties to be made part of the case, that if the Supreme Court should be of opinion on the foregoing statement, that the plaintiff was entitled to recover, the verdict and judgment should be set aside, and judgment should be rendered by the Supreme Court in favour of the plaintiff, for the sum of one thousand three hundred and sixty-six dollars and fifty-five cents, and the costs of both courts; but if the Supreme Court should think the judgment correct, then the same should be confirmed with costs.

Devereux, for the plaintiff.
Badger, and *W. H. Haywood,* for the defendant.

RUFFIN, Chief Justice. The Court is of opinion, that the registration of the deed to the plaintiff is to be considered under the provisions of the act of 1829, c. 20, as having been made on 4 Sept., and is therefore prior to the lien of the execution tested on the 7th of the month. The latter act is different from that of 1820, (Rev. ch. 1037) upon which the case of *Moore v. Collins,* 15 N. C., 384, was decided. That makes deeds of trust void unless they be registered within six months; and there is nothing in it to denote that any thing short of a complete registration by fully transcribing the instrument into the books of the register, is to be a registration, or constitute part of it. The opinion delivered by my brother Daniel adverts particularly to that circumstance, as distinguishing the two statutes, and we think it a plain and sound distinction. The act of 1829 does not avoid a deed of trust for want of registration at any particular time; but it declares that it shall not operate "but from" the registration; and the question is, at what period the registration shall be
(83) said to be made.

The defendant contends, that it is only when it shall have been completed by spreading the deed and the whole of it upon the record. We think otherwise. It is obvious, that the legislature meant that the deed should not begin to operate until it was deposited with the register. There is no delivery of it, if we may use the expression, as against creditors and purchasers, but the delivery to the register; in whose hands those persons could see its contents at all times afterwards, either by persuing the original or the transcript. For that reason, it is to operate from that delivery; for, while the act thus ties up the operation of the deed, it at the same time provides that immediate probate or acknowledgment may be taken by the clerk; and that the register shall endorse on each deed the day on which it was *delivered to him* for registration, and that such endorsement shall be entered on the register's book and *form a part of the registration.* The act further requires the officer immediately thereafter to register the deeds in the order of time in which they were delivered. In the nature of things, the act of register-

ing the deed, that is to say, of transcribing it, cannot be done in an instant, and there must be a prior and posterior as to the different parts of it; yet, since the note of the day of delivery is made a part of the registration, when that is done, it thereby appears at what particular time the deed was delivered for registration, and that it was then in a course of being registered thenceforward until it was done. The truth is, that where a ceremony necessarily embraces distinct periods of time in its performance, and is constituted of several acts, which, when completed, make but one whole, there is a necessity *ut res magis valeat quam pereat,* that all that is done, should be referred to the period at which it was begun. If two or more distinct things are necessary to give validity to a thing, both must be performed, and one cannot be connected with the other. Such, in the case before us, are probate and registration. The latter cannot relate in point of time to the former. But registration in itself is but one thing, necessarily indeed made up of successive operations, consuming more than an instant of time; and as the registration cannot be said not to exist at any instant after it (84) was begun, the intermediate lapse of time is not regarded, and the whole relates to the first moment, so as to make the act operative therefrom. It is upon this principle, that the relation of a judgment to the first day of the term depends; and we believe it equally applicable to every case, in which there is necessarily more than an instant consumed in the performance of a single act. From the beginning, the whole is one continuing act; and therefore, in legal contemplation, it is done from the commencement. The substance of the act of 1829 is therefore, we think, that a deed, when registered, is to be deemed to have been registered from the delivery to the register, as noted by him on the deed.

We the more readily adopt this construction, because the act of 1829 is known to have been taken from the English annuity act, and it is safe therefore to incorporate into our law a settled construction of that act. The case of *Garrick v. Williams,* 3 Taunt., 540, decides that the enrollment may be entered as of the day and hour the memorial was delivered into the office and that the court will not look out of the enrollment, as it appears of record, for the time at which it was made.

We have no doubt but the schedules form part of the deed, and ought to be registered, for without them there is no description of the things conveyed; but for the reasons already mentioned, it was unnecessary that the register should have stated the different periods at which the different parts of the deed were transcribed; for although not true in point of fact, it is true in point of law, that the whole was registered together on the fourth day of the month.

It is however, objected by the defendant, that the deed was proved by an incompetent witness, and therefore that the probate and registration founded thereon are void. We do not assent to that inference, although we do not concur in the answer of *"res judicata"* given to it at the bar. Probates of deeds are *ex parte,* and do not conclude. The deed may still be shown to be a forgery, or to have been executed by an infant or a feme covert. The person taking the probate does (85) not adjudge and decide the instrument to be a deed, but only sees that the person offered as a witness to prove it, is the person who attested it; and he certifies that the execution was proved by that person. The *factum* and the identity of the witness are all the certificate concludes. Hence, unless a statute expressly make the deed evidence, and authorize it to be read upon such proof, it cannot be; but upon the trial, it must be proved as at common law, and as if it had not before been proved or registered. The probate and registration are only to perpetuate the instrument and give notice of its contents. We think therefore, that the probate was not conclusive, as *res judicata,* especially as in this case the deed is for chattels only, and could not be read upon the trial without the evidence of one of the subscribing witnesses; but for the same reason, we are of opinion that it was sufficiently proved on the trial, and that the incompetency of the witness who proved it before the clerk does not vitiate the probate or registration. The registration, no matter upon what proof made, gives the notice designed for creditors and purchasers. The instrument is not like a will, which requires for its validity attestation by a certain number of disinterested witnesses; and when registered it is not read like a will is, which is conclusive evidence of the devise upon the adjudication of the court of probate. The probate of a deed is but a memorial that the attesting witness, whoever he may be, and competent

or incompetent to testify on a trial before a jury, swore to the *factum* of the instrument by the parties, whose act it purports to be; and as the officer who takes the probate does not look into the instruments or the interests acquired under it, so the competency or incompetency of the witness is not a question before him. It may be shown at the trial, that the witness is incompetent, and therefore could not prove the deed, and that will make it necessary to call witnesses who are competent, but it will not render the instrument void for the want of probate and registration, when in fact there have been both probate and registration. In this respect, the present case differs from *Jones v. Ruffin,* 14 N. C., 404, which was cited by the defendant's counsel as an authority that the probate even by one incompetent witness is conclusive: (86) and from the report it might seem so, as the deed was there read upon the probate and registration. But the reason why no other evidence was deemed necessary by this Court and the counsel in that case, was, that the witness who proved the deed was not interested in the particular tract of land in dispute in that action, and therefore the deed, as it operated between the parties to the suit, had been proved by a competent witness, and was one which under our statutes could be read without other proof, on the trial. That case therefore is not an authority on either side here; but without it, or any other, we think, from the nature of the thing, that a deed which has in fact been registered upon proof by one appearing on its face to be a witness to it, and is proved by competent evidence on the trial to have been duly executed, is not rendered void or inoperative by the circumstance that one of the subscribing witnesses was not a competent person to attest and prove the deed. Every object of the law is answered by the registration, and the proof of execution on the trial.

The judgment must therefore be reversed; and judgment be given for the plaintiff for the sum mentioned in the case agreed, and for the costs in both courts.

PER CURIAM. Judgment reversed.

Cited: Metts v. Bright, 20 N. C., 311; *Flemming v. Burgin,* 37 N. C., 589; *Latham v. Bowen,* 52 N. C., 341; *Parker v. Scott,* 64 N. C., 120; *Starke v. Etheridge,* 71 N. C., 245; *Holmes v. Marshall.* 72 N. C., 41; *Tatom v. White,* 95 N. C.,

46; *Davis v. Whitaker,* 114 N. C., 280; *Quinnerly v. Quinnerly, Id.,* 147; *Glanton v. Jacobs,* 117 N. C., 429.

(87)

Den. ex dem. JOSEPH W. TARKINTON v. HENRY ALEXANDER.

1. A writ of *venditioni exponas* directed "to the sheriff," for the sale of land levied upon by a sheriff who has gone out of office, will not authorize a sale of the land by such late sheriff; for whatever power is granted by the writ, is given to him to whom it is directed.

2. An ex-sheriff cannot sell lands levied upon by him under a *fi. fa.* while he was in office, without a *venditioni exponas* directed to him; and it *seems*, that when a sheriff has levied upon lands which remain unsold until after he goes out of office, the *venditioni* should issue to his successor, and not to him.

3. Where a sheriff has levied upon both lands and goods, and gone out of office, a general *venditioni* may issue to the new sheriff, where the goods have been delivered over to him; but if he cannot get the goods from the old sheriff, a *distringas* should issue to him to compel the old sheriff to sell the goods; to which may be added a special *venditioni*, in case the moneys thereby raised be not sufficient to satisfy the judgment, authorizing the new sheriff to sell the land—or if the plaintiff chooses to *waive* the *levy*, a special *fi. fa.* to the new sheriff for the residue.

The cases of the *Governor v. Eastwood*, 12 N. C., 157, and *Saunderson v. Rogers*, 14 N. C.,38, explained and reconciled with those of *Barden v. McKinnie*, 11 N. C ,279, and *Seawell v. Bank*. 14 N. C.,279, and all approved.

Ejectment, for a tract of land, tried at Tyrrel, on the last Circuit, before *Norwood, J.*

The lessor of the plaintiff claimed as heir-at-law to one Zebulon Tarkinton, and having made out his case, the defendant set up title as follows: He produced a judgment rendered at April Term, 1830, of Tyrrell County Court, in favour of one Samuel Spruill, executor of Benjamin Spruill, against the said Zebulon Tarkinton, for the sum of eight hundred and seventy-two dollars and seventy-nine cents, upon which a writ of *fi. fa.* issued from that term, and was returned to July Term ensuing, levied on the lands of the said Benjamin Tarkinton, by E. Mann, the then sheriff. Writs of *venditioni exponas* were issued regularly from term to term thereafter, until January Term, 1834; when the land levied on, being the

same as that now in controversy, was sold by the aforesaid E. Mann to Ebenezer Pettigrew, and a deed of bargain and sale was executed therefor by Mann, bearing date 1 May, 1834. A few days afterwards Pettigrew sold and conveyed the same land to the defendant. It appeared that E. Mann continued in office until October Term, 1832, (88) when a successor was appointed; and it appeared further that the writs of *venditioni exponas,* before mentioned, including that on which the sale was made, were directed to "the sheriff of Tyrrell county," but went into the hands of E. Mann, *then the late sheriff,* who made the sale and executed the deed as before stated; and the sale purported to have been made, and the deed to have been executed by "E. Mann, late sheriff."

Upon this case his Honor was of opinion, that the *venditioni exponas,* being directed to "the sheriff," gave no authority to the *late* sheriff, to sell the land, although it went into his hands, and therefore that the purchaser acquired no title. A verdict was rendered for the lessor of the plaintiff, in accordance with this opinion, and the defendant appealed.

Devereux, for the defendant: The case of *The Governor v. Eastwood,* 12 N. C., 157, is expressly in point, to show that a sheriff may sell land upon which he has levied after he goes out of office; and that case is fully supported by the case of *Sexton v. Wheaton,* 4 Wheat., 503. In *Seawell v. Bank,* 14 N. C., 279, *Chief Justice Henderson* indeed laid down a different rule, founded upon the notion of there being a difference in this respect between land and personal goods; but this was said only *arguendo,* as the question in that case was, whether an unsealed writ directed to the sheriff of another county, was a mere nullity. Why should there be a difference between chattels and real estate? In the English law there can no case be found of a difference between a levy on chattel real and an estate of inheritance. *Judge Henderson* says, the distinction is founded on the fact, that the law gives to the sheriff a property in chattels, which he may vindicate by an action, if necessary, but it only gives a *power* to sell land. But is it not a mere power in both cases? The reason why an action is given to the sheriff in case of personals, is, that he may be able to protect himself from the liability to loss in regard to them; but as he is liable to no loss on account

of the land, the law, which does nothing in vain, gives him no action. The writs as against land and chattels should
(89) certainly be directed to the same officer; and I should think it best that they should go to the new sheriff, but that is now clearly settled otherwise.

It is a maxim, that an execution is an entire thing, and whoever begins, must end it. Suppose a sheriff should die, after levying upon land and goods, will you issue *venditioni exponases* to different persons?—such a rule would create confusion. *Saunderson v. Rogers,* 14 N. C., 38. In *Matlock v. Gray,* 11 N. C., 1, it is decided, that a sheriff is entitled to his commissions upon making a levy. Suppose he levies upon land, and goes out of office, shall he not sell to satisfy himself? or will you require the new sheriff to sell without compensation? Suppose a sheriff levies upon land and slaves, and takes a forthcoming bond for the slaves, and dies; will the executor be fined, and not be allowed to sell the land for his indemnity?

Heath, for the lessor of the plaintiff: Three points are presented in this case, viz.: 1. Had the *late* sheriff, under the circumstances, a right to sell? 2. Could he sell without process? 3. Had he process authorizing the sale?

1. It is said that the case of *Governor v. Eastwood,* 12 N. C., 157, is a direct authority for the regularity of the sale. I think not, for this reason: in that case, the plaintiff's claim was for three hundred dollars only: *personal* property to the amount of fifteen hundred dollars was sold, and there was therefore a breach of the bond, without involving the question as to the right of the late sheriff to sell realty. Hence the general remarks of the judge must be confined to the subject-matter, viz. the sale of the personalty; in relation to which they are unquestionably correct.

The case of *Saunderson v. Rogers,* 14 N. C., 38, is cited, to show that an execution is an "entire thing," and that the hand that begins must end it. That this also was a case of personalty, is apparent from the fact, that a forthcoming bond was given: and the opinion of his Honor *Judge Ruffin* is liable to the same remark, as in the case of *Governor v. Eastwood,* that the general words must be construed in ref-
(90) erence to the particular state of facts. But why is an execution said to be an "entire thing"? For this, that

in England, where the *fi. fa.* runs against chattels only, by the levy the defendant in the execution loses the possession and property, and the sheriff acquires it; the defendant is discharged *pro tanto,* and the sheriff is charged to the amount. And the old sheriff having the possession and property, it would be idle to direct the *venditioni* to the new sheriff, who has no means of acquiring the one or the other. It is otherwise as to realty. The sheriff sells land by virtue of a power, and not by virtue of a property. He acquires by levying, neither possession, nor property; nor can he after the sale, even give the purchaser possession. *Frost v. Etheridge,* 12 N. C., 30. Hence, the reason ceasing, why the *venditioni* should go to the old sheriff, the rule should cease with it.

It is asked, in argument, "suppose the sheriff levy on both *realty* and *personalty*, and die, is a *venditioni* to go as to the realty to his successor, and as to personalty to his executor? Why not? A plaintiff may have as many *fi. fas.* running at the same time, as he pleases, but he must be careful not to levy too much: he may have a *ca. sa.* and a *fi. fa.* running at the same time, but he must at his peril have them executed in proper order. So here the plaintiff must be careful first to exhaust the personalty, and then, through the successor of the sheriff, he may go against the realty.

It is also asked, if the sheriff levy on land and negroes, and the sale is postponed, and the sheriff sell for his commissions, and then die, and the slaves be eloigned or insufficient, how is the successor to be compensated for the sale? It may be, that the old sheriff not having completed the sale, his executor may be compelled to refund; or the plaintiff in the execution may be liable therefor on a *quantum meruit;* or the new sheriff may collect his commissions, and leave the executor and the defendant to adjust it between them.

It is further asked, if the sheriff levy on personalty and realty, and take a forthcoming bond, and then die, and the personalty be eloigned, how is the executor to be indemnified, unless *he* can sell land? This supposition (91) contains its own answer. He must resort to the indemnity given to his testator.

The opinion of *Judge Henderson*, in the case of *Seawell v. Bank,* 14 N. C., 279, is full to the point, that so far as

realty is concerned, the *venditioni* must go to the new sheriff.

2. Could the officer sell without process? This question is not open to discussion, it being settled by the case of *Barden v. McKinnie*, 11 N. C., 279, confirmed by *Seawell v. Bank*, that he cannot do so.

3. Had the late sheriff process authorizing the sale? On this point, it would be idle to look for authorities; and if it be not a plain case of usurpation of power on the part of the late sheriff, I know not what is. I conceive it too plain, even to admit of elucidation by argument.

GASTON, Judge: It is essential to the security of property and the repose of society, that the rules by which judicial sales are regulated, should be clearly defined and strictly observed. He who sets up title under such an alienation, cannot invoke the aid of the law, if it be made inconsistent with the requirements of the law. The sale made of the land in controversy by the former sheriff, and the deed in pursuance thereof, transferred no estate unless such ex-sheriff had authority to sell. We cannot for a moment admit that he derived such authority from the writ of *venditioni exponas directed to his successor*. Whatever power was granted by that writ, was granted to *him* to whom it was directed. If the former sheriff could assert this power, every one in the land might equally assert it. This cannot be. The exercise of the power by a stranger to the writ is an act of usurpation.

The defendant, therefore, is necessarily driven to contend, that the ex-sheriff had a right to sell, without any mandate from the court, because of the levy he had made, under the *fieri facias*. This ground, however, cannot be maintained, without overturning the most express and authoritative adjudication. In the case of *Barden v. M'Kinnie*, 11 (92) N. C., 279, it was decided by this court, that a sale of land by the sheriff, after a return of *fi. fa.* and without a new writ, is made without authority, and passes no title. In *Seawell v. Bank*, 14 N. C., 279, this court, upon solemn argument, reaffirmed the same doctrine, in the most explicit terms. It has been argued, however, that these adjudications are repugnant to those in *Governor v. Eastwood*, 12 N. C., 157; and *Saunderson v. Rogers*, 14 N. C., 38; and that in this conflict of authority we are at liberty to settle the ques-

tion upon principle. But on examination, it will be clearly seen, that the decisions in all the cases are reconcileable with each other, and that all authority is against the position which the defendant endeavours to maintain. In *Governor v. Eastwood,* it appears that the relators, the executors of Holliday, had recovered three several judgments against Brand, amounting in the whole to three hundred dollars; that the sheriff had levied the executions issued on these judgments on certain negroes, as well as on the land of Brand, and returned no sale for want of bidders; that afterwards, without any *venditioni,* or other execution in his hands in behalf of the relators, he sold the negroes for fifteen hundred dollars, and the land for the like sum; that he retained in his hands money to satisfy the judgments of the relators, "and other demands" against Brand, and paid over to Brand the residue. There was no pretence that these "other demands," or any of them, had a preferable claim to satisfaction over the executions of the relators. Without regard, therefore, to the money received as the price of the land, he had made out of the negroes seized upon these executions a sum more than sufficient to discharge them; and this amount was raised by a sale consummating his levy under the executions. In *Sanderson v. Rogers,* it is apparent, that the property upon which the levy was made consisted of chattels which had been *seized* by the former sheriff. A *venditioni* issued to the new sheriff, who required from the defendant in execution, and by threats of seizing those chattels, extorted from him, a *forthcoming bond.* It was held that the writ of *venditioni* conferred no authority to seize; that it improperly issued to the new (93) sheriff to compel him to sell what had been seized by his predecessor: that a *venditioni* is predicated upon the *effects* being in the hands of the officer to whom it is directed: that a levy under a *fieri facias* vests a property in the sheriff who seizes, which satisfies the debts, and makes the sheriff liable: that therefore he may sell after the return of the writ, and after his office had expired: and that upon his death, the property vests in his *executors,* who become responsible for the debt, and may sell the *chattels.* The whole of the doctrine so far asserted in the two last cited cases is in perfect conformity with that which was recognized in the others. In *these* it was held, that a seizure of chattels under a *fi. fa.* did

vest a *property* in the sheriff by virtue of which he could assert an action founded on the right of property, became charged to the plaintiff for the value of the goods seized, and discharged the debtor to the same amount; but it was also held, that from the essential difference in the nature of the property, the operation of a *fi. fa. levied* upon *lands* must be different; for that under such a levy the sheriff takes no possession, acquires no property, does not become liable for the value, nor discharges the defendant to that or to any amount. In consequence of the special *property* acquired in the goods by *seizure,* he could sell without any further command; but as he acquired *no property* by a levy on land, and as the *power* to sell conferred by the *fi. fa.* expired by its own limitation, he could not, after the return term, sell land, unless a new authority was granted for that purpose.

This distinction, thus recognized and settled, between the operation of a seizure of goods, and of a levy upon land under a *fi. fa.,* we should hold ourselves bound to consider as a part of the law of the land, even if we disapproved of the reasoning upon which it was established; but what is there in that reasoning inconsistent with legal principles? It cannot be denied, although lands as well as chattels are with us liable to be sold on a *fi. fa.,* but that the law directing the sale of these two species of property *must,* in some respects, (94) be so moulded, and in many has been so moulded, in its application to them, as to be suited to their characteristic distinctions. Thus it was held, and no one doubts that it was properly held, in an early period of our jurisprudence, that since the statute 5 George II, the same distinction exists between real and personal property as before, and that lands descended to an heir are not liable to be sold on a judgment against the executor of the debtor. *Baker v. Webb,* 2 N. C., 71. It is clear law, that a mere levy on lands does not in any manner divest either the property or possession of the debtor. This principle was recognized by all the court in the case of *Frost v. Etheridge,* 12 N. C., 30, and a majority of the judges held that even a sale under that levy should not relate back to the levy, so as to divest the freehold against the widow's claim to dower. We have ourselves recently declared the principle *in extenso* in *State v. Greenlee,* 15 N. C., 150. As the sheriff, then, takes no possession, nor acquires any prop-

erty by a levy on lands, assuredly he cannot maintain either ejectment or trespass in regard to them, while it is certain that he may bring either trespass, detinue, or trover, after a seizure of chattels. It would be at variance with all legal analogies to hold that a man was divested of his freehold by a mere indorsation on a *fi. fa.* of a levy upon his land of which he cannot be presumed to know anything until it is returned; but the *taking* of his chattels is a notorious act, of which he can scarcely be ignorant. Besides, if a levy on lands passed any property to the sheriff, it must be a *freehold* estate, which upon his death would descend to his heir, and could not go to his executors, as is the case with goods that have been taken in execution. Rightly, therefore, does it seems to us, has it been established by our predecessors, that while a seizure of goods vests a special property in the sheriff, so that he needs no authority to sell, a levy on land vests no property, and under that levy he cannot sell after his authority is at an end, unless it be renewed. The levy operates as a *lien* which sets apart the land levied upon for the satisfaction of the creditor's judgment, and by virtue of this lien he may by proper process cause the land to be applied to that (95) purpose as against the debtor, or his alience, or his representatives, or his creditors whose liens subsequently attach. By allowing to it this operation, efficacy is given to the enactments of the statute; while by denying to it the effect of divesting the possession or property of the debtor, the settled distinctions between real and personal estate are upheld, proper regard is shown to the different modes pursued in making a seizure of goods, and a levy on lands, and much injustice, oppression and confusion are prevented. We deem it not amiss to add, that the distinctions on which we have commented, are, indeed, most striking between lands and *personal* chattels, while chattels *real* seem to hold an intermediate grade between these two species of property: yet the latter belong to the general class of *personal property*, are (in the language of the Court of King's Bench in *Scott v. Scholey*, 8 East, 484) of a tangible nature, capable of manual seizure, of a transfer of possession, and of a detention in the sheriff's hands: and when so taken under a *fi. fa.*, a property therein vests in the sheriff, which enables him to make a sale without a *venditioni*, or after he is out of office, and which, on his death,

passes to his personal representative. *Scanes v. Wilkins,* 1 Ves., 195; *Stevens v. Douston,* 1 Barn. & Ald., 230. Whether a levy on a chattel real would be good for *any* purpose, without an actual taking or some notorious act equivalent thereto, or if effectual so far as to operate a lien, whether it would transfer any *property* to the sheriff, are questions which have not been discussed, and are not necessarily now under examination, and which may deserve serious consideration.

A question has been much discussed at the bar, on which we might forbear to express an opinion, as the decision of that question is not necessary to the determination of this case; but as it involves an inquiry respecting the proper forms of judicial process, which ought to be the same throughout the state, and as a difference of opinion in regard thereto seems to have been entertained among our predecessors, we (96) avail ourselves of this opportunity to effect, as far as we can, uniformity of practice. In *Governor v. Eastwood,* 12 N. C., 157, *Judge Hall* intimates, that when a levy has been made on land, and the sheriff who made the levy is out of office, the *venditioni* should be directed to *him,* because he commenced the execution, and ought to finish it. In *Seawell v. Bank,* 14 N. C., 279, *Chief Justice Henderson* expressed a decided opinion that it ought to be directed to his successor, and states as a fact, that such has been the universal usage. If we were sure that either practice had been uniformly observed, we should not be disposed to change it, however it might have been settled. We are satisfied, however, that this has not been the case. It will be understood, that we do not mean to intimate an opinion, that a sale under a *venditioni* may not confer a good title, when made by him to whom it was directed, whether he be the sheriff who made the levy, or his successor; but it seems to us most expedient and consistent with legal usage, that where a writ issues giving authority either over the person or property of the citizen, it should be directed to the officer of the court, whose obedience can be most effectually commanded, and whose disobedience or neglect of duty can be most effectually visited. Where there has been a levy on land only, there is no reason why the *venditioni* should not be directed to the new sheriff. There may be in some respects a convenience, where there has

been a levy both on goods and land, and the goods remain unsold, in addressing the *venditioni* to the old sheriff: but this convenience is not sufficient, in our judgment, to overrule the irregularity of such a course, and the many inconveniences which may result from it. In such a case, if the goods have been delivered over to the new sheriff, or he can obtain them from the old sheriff, we see no impropriety in a general *venditioni* to the new sheriff. If the goods cannot be had by him, a *distringas* to the new sheriff to compel the old sheriff to sell the goods will be the appropriate process, to which may be added a special *venditioni,* in case the moneys thereby raised be not sufficient to satisfy the judgment, authorizing the new sheriff to sell the land—or, if the plaintiff chooses to *waive* the *levy,* a special *fi. fa.* to the new (97) sheriff for his residue. The modifications here suggested become necessary to carry into effect our statutory provisions, by which personal property is to be first applied to the satisfaction of debts. Should it afterwards appear, either by return of the *distringas,* or by suggestions of record, that the goods have been eloigned by the defendant, and the plaintiff desires any further remedy against him, it seems to us, that on a *scire facias* to show cause why this remedy may not be had, the court may direct such process against the defendant or his property, as shall fully meet the exigencies of the case.

PER CURIAM. Judgment affirmed.

Cited: Spruill v. Bateman, 20 N. C., 628; *Smith v. Spencer,* 25 N. C., 265; *Samuel v. Zachary,* 26 N. C., 379; *Badham v. Cox,* 33 N. C., 460; *Tysor v. Short,* 50 N. C., 281; *Ripley v. Arledge,* 94 N. C., 472; *Cowen v. Withrow,* 114 N. C., 559; *McGloughan v. Mitchell,* 126 N. C., 683.

Den. ex dem. DUNCAN HARGROVE v. JOSIAH POWELL.

1. In an action of ejectment by one tenant in common against another, proof of a demand to be let into possession by the lessor of the plaintiff subsequent to the demise laid in his declaration, and a refusal by the defendant, denying the plaintiff's right, is evidence from which the jury may infer a previous ouster, or adverse possession, at the time of the demise laid in the declaration.

2. By entering into the general consent rule, a tenant in common admits the ouster of his companion. To avoid such admission, when there has been no actual ouster, he must apply to the court, for leave to enter into a *special rule*, requiring him to confess lease and entry at the trial, but not *ouster* also; and this special rule will always be granted, when the tenant does not dispute his co-tenant's title; but where he does dispute his companion's title, he shall be compelled to confess lease, entry and ouster, before he pleads.

This was an action of ejectment, in which the defendant entered into the common rule, and plead not guilty. The cause was tried at Bladen, on the last Circuit, before *Saunders, J.*, when it appeared that the lessor of the plaintiff was entitled to be let into the possession of the land mentioned in the declaration, as a tenant in common with the defendant and others. In April, 1833, before the delivery of the
(98) declaration in ejectment, he had demanded to be let into possession, but the defendant refused him, denying his right, and saying that he, the defendant, held possession for his father-in-law. The lessor of the plaintiff then brought this action, and laid the demise in the declaration, on the 1st day of August, 1832, and the *ouster* on the day after, to-wit, 2 August, 1832. Upon this statement, the defendant contended, that there was no proof of an *actual ouster* at the time mentioned in the declaration. His Honor charged the jury, "that the possession of one tenant in common was *prima facie* the possession of his co-tenant—and to rebut this presumption it was necessary to prove an actual ouster—not an act accompanied with real force, but circumstances from which such an ouster could be inferred;—and though the plaintiff must show this ouster or adverse possession by the defendant at the time of the demise laid in the declaration, yet the subsequent demand and denial of the plaintiff's right, was a circumstance from which they might infer the previous adverse possession." There was a verdict for the plaintiff, and a rule for a new trial was moved for upon the ground of

misdirection in the charge. His Honor discharged the rule, saying, that even if the instruction were erroneous, as the defendant had entered into the general consent rule, he could not avail himself of the want of proof of an actual ouster, as a defence. Judgment for the plaintiff, and appeal by the defendant.

No counsel appeared for the defendant in this Court.
W. H. Haywood for the lessor of the plaintiff.

DANIEL, Judge, after stating the case as above, proceeded: We are of the opinion, that the judge was correct in refusing a new trial, on both points in the case. First, the demand of the plaintiff to be let into possession in April, 1833, and the refusal by the defendant, accompanied with the declaration, that he held the lands for his father-in-law, was a circumstance properly left to the jury, from which they might infer the previous adverse possession, or an actual ouster at the date of the demise, as stated in the declaration. (99) *Secondly,* the general consent rule, will in all cases, be sufficient to prevent a nonsuit for want of a real lease, entry, and ouster, except when it is necessary that an actual entry should be made upon the land previously to the commencement of the suit; as in cases when fines with proclamations have been levied. Adams Ejectment, 90, 236. When, therefore, an ejectment is brought by a joint tenant, parcener, or tenant in common, against his companion, (to support which, an actual ouster is necessary) the defendant ought to apply to the court upon affidavit, for leave to enter into a *special* rule, requiring him to confess lease and entry at the trial; but not *ouster* also, unless an actual ouster of the plaintiff's lessor by him, the defendant, should be proved; and this special rule will always be granted, unless it appear that the claimant has been actually obstructed in his occupation. He, (a tenant in common) shall not be compelled to confess *"ouster,"* when he does *not* dispute the title: but when he *does* dispute it, he shall be compelled to confess lease, entry, and ouster, before he pleads. *Oates v. Brydon,* 3 Burr, 1897; *Ginger v. Roe,* 2 Taun., 397; *Prindle v. Lytte,* 4 Cowen, 16; *Jackson v. Stiles,* 6 Cowen, 391. We think the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Withrow v. Biggerstaff, 82 N. C., 85.

GEORGE K. WALKER v. SAMUEL W. W. VICK.

A precept directed to the "sheriff or jailor" of a county, and commanding him to receive the body of the defendant "into the common jail of the county, and him safely keep within the walls of said jail until he shall render" to the plaintiff "the amount of the judgment," etc., is not a *ca. sa.* but a *mittimus*, and without a proper *ca. sa.* will not authorize the detention of the defendant, nor make the sheriff liable for his escape.

(100)

This was an action of debt against the defendant, as sheriff for an escape. Upon the trial at Nash, on the last Circuit before *Strange, J.*, the plaintiff produced a judgment in favor of himself, against one Woodard, rendered by a single justice on 12 Jan., 1835. He then offered in evidence a paper writing, which he contended was a *capias ad satisfaciendum;* on which was endorsed, "23 January, 1835. Ex'ed, Samuel W. W. Vick, Shff. By William Arrington, D. S." This paper was attached by a wafer to that on which the judgment was entered, and was in the following words, to-wit:

"State of North Carolina,
Nash County.

To the Sheriff or jailor of said county.

You are hereby commanded to receive into the common jail of the county aforesaid,, the body of Elijah Woodard, and him safely keep within the walls of the said jail, until he shall render unto George K. Walker, the amount of the annexed judgment, interest, and cost due thereon, or be otherwise discharged according to law. Given under my hand, &c., this 23 Jan., A. D. 1835.

(Signed) B. BATCHELOR, (J. P.)"

It was objected by the defendant's counsel, that this was not a *ca. sa.;* but it was received as such by the court, and the jury found a verdict for the plaintiff, and the defendant appealed.

No counsel appeared for the defendant in this Court.

Devereux, for the plaintiff, referred to the case of *Finley v. Smith,* 15 N. C., 95, and endeavored to distinguish this case from it.

DANIEL, Judge, after stating briefly the facts as above, pro-

ceeded: It seems to us, that the instrument offered as a *ca. sa.* cannot be considered in that light, because in form it is essentially different from a writ of *capias ad satisfaciendum;* and what puts it beyond doubt is, that it is directed to the sheriff or *jailor.* The jailor, as such, is not an officer to whom process ever issues to make an arrest. It does not appear that Woodard was surrendered in discharge of bail, or that he had been arrested on a *ca. sa.* The instrument appears to us to be a *mittimus;* but Batchelor had no authority to (101) commit before Woodard was legally in custody. We are of the opinion, that the judge erred in considering the instrument a *ca. sa.* We, therefore, are of the opinion, that there must be a new trial.

PER CURIAM. Judgment reversed.

Cited: Brock v. King, 47 N. C., 304; *Siler v. McKee, Ib.* 380.

JOHN MARTIN v. JOSIAH COWLES.

1. In an action for the breach of a covenant for quiet enjoyment, the record of a recovery in ejectment by a third person against the vendee, effected after notice to the vendor of the pendency of the ejectment, is not conclusive evidence against the vendor, of the superior title of such third person.

2. *It seems* that such record is not any evidence of title against the vendor.

The cases of *Saunders v. Hamilton,* 3 N. C. 282; *Shober v. Robinson,* 6 N. C. 33; and *Williams v. Shaw,* 4 N. C. 630, approved.

After the new trial granted in this case at December Term, 1834, (18 N. C., 29) it was again tried at Surrey on the last Circuit, before *Dick, J.,* when in addition to the facts as they appeared on the former trial, it was admitted by the defendant that he had notice of the pendency of the action of ejectment, brought against the plaintiff's tenant. Upon this case the plaintiff's counsel moved the court to instruct the jury that the plaintiff was entitled to recover his purchase money, and the costs of the action of ejectment, but his Honor de-

clined giving the instruction; and a verdict being rendered for the defendant, the plaintiff appealed.

No counsel appeared for the plaintiff in this Court.
D. F. Caldwell, for the defendant.

GASTON, Judge: The only question on this appeal, is, whether in an action brought by a vendee, against his vendor, for a breach of the covenant for quiet enjoyment, a recovery in ejectment by a third person against the vendee, ef-
(102) fected after notice to the vendor of the pendency of the ejectment, is conclusive evidence of the title of the lessor of the plaintiff.

We have no hesitation in answering this question in the negative. In our opinion, the record of the judgment is not only not conclusive evidence, but is not any evidence of title, against the vendor. It would be repugnant to principle, to bind any one by a judgment in a suit, where, if an opposite judgment had been rendered, he could derive no benefit from it, to which suit he was not a party, nor had it in his power to become a party, and where he could not challenge the inquest nor examine witnesses, nor exercise any of the means provided by law for ascertaining the truth, and asserting his right. In real actions a warrantor might be made a party by voucher; in ejectment a landlord may come in to defend the possession of his tenant; but there is no provision in law, by which a vendor can be brought in to vindicate the possession of his vendee. To a judgment against the vendee, the vendor is a stranger, and, therefore, that judgment is against him, evidence only of the fact of the judgment, and of the damages and costs recovered. *Saunders v. Hamilton,* 3 N. C., 282; *Shober v. Robinson,* 6 N. C., 33; *Williams v. Shaw,* 4 N. C., 630, all recognise this doctrine; and whatever opinion may have once been entertained, we had thought that for many years back, it had been perfectly settled.

We take this occasion to refer, although the decision heretofore made when this case was before us, (18 N. C., 29) is not now questioned, to an ancient authority which then escaped our notice, Godbolt, 161, where it is said that if one sell his goods fraudulently, and they be afterwards sold *bona fide* to a second vendee, they are not liable to be taken in the hands

of the second vendee, for the debts of the fraudulent vendor. The judgment of the Superior Court is affirmed.

PER CURIAM. Judgment affirmed.

Cited: *Wilder v. Ireland,* 53 N. C., 88.

(103)

Den. ex Dem. JESSE TESTERMAN, et Uxor, v. WILLIAM POE.

1. One who bids off land at a sheriff's sale, may relinquish his bid to another either in writing or by parol, and the sheriff's deed to the latter will be valid.

2. A sheriff's deed relates to the time of the sale, and operates from that time against any subsequent transfer, whether made by the party or by the sheriff, under an execution against the party.

3. *It seems* that a purchaser under execution, who advances in part his own money, and in part that of the defendant in the execution, may acquire a sufficient title to stand as a security for his own money advanced, unless he intended to deceive the creditors, by claiming the purchase as an absolute one.

4. A *bona fide* purchaser of land at a sheriff's sale, does not extinguish his title at law, by consenting that the same land may be levied upon and sold under another execution; although it might be a fraud upon the person in whose favor he gave such consent, which would sustain a personal action at law, or be the ground of relief in equity.

This was an action of Ejectment for a tract of land, tried at Ashe, on the last Circuit, before *Dick, J.*

The lessors of the plaintiff, and the defendant, both claimed under executions against one Morrice Baker. The lessors of the plaintiff in support of their title, produced a judgment regularly obtained at the August Term of the County Court of Ashe, 1828, and an execution issued thereon, under which the sheriff levied upon and sold the land in question, on 10 Nov., 1828, to one Absalom Bowers, for the sum of ninety dollars, and the sheriff afterwards, on 17 April, 1831, executed a deed for the same land, by the parol directions of A. Bowers to Mary Baker, who was one of the lessors of the plaintiff, and who afterwards intermarried with the other lessor. The defendant on his part then showed a judgment, in favour of one George Bowers, regularly obtained at August Term, 1830, of the County Court of Ashe, an execution issued thereon, a levy upon the same lands, and a sale made

by the sheriff in November of the same year, when one Goss became the purchaser, to whom the sheriff executed a deed, on 1 April, 1831, and from whom the defendant after-
(104) wards purchased. The defendant in further support of his title, alleged that the purchase made by Absalom Bowers, at the sheriff's sale in 1828, was fraudulent, and therefore void, and he introduced several witnesses for the purpose of showing that the said purchase was made wholly or in part with Morrice Baker's money and for his benefit. The defendant also alleged, and endeavoured to prove, that Absalom Bowers had given permission to George Bowers to have his execution levied upon the lands in dispute, and to have them sold under the same.

It was contended for the defendant that the sheriff's deed of 17 April, 1831, did not convey a good title to Mary Baker. 1st. Because the sheriff had no authority to convey the lands to her without a written authority from Absalom Bowers, the purchaser. 2dly. Because the legal title to the land remained in Morrice Baker, at the time of the sale to Goss, notwithstanding the sale to Bowers, and that Goss's deed being the oldest, it conveyed the legal title in the land to him. 3rdly. That A. Bowers had purchased the land with the money of Morrice Baker, and for his benefit, and that, therefore, any title derived from or through the said A. Bowers, was fraudulent and void as to the creditors of the said Baker. 4thly. That A. Bowers, had given George Bowers (the plaintiff in the execution under which Goss purchased), permission to levy upon and sell the said tract of land.

His Honor charged the jury upon the first point. that a purchaser of land at an execution sale, might transfer his bid, and direct the sheriff to execute a deed to another, by parol without writing. On the second point he charged, that the deed executed to Mary Baker, by the sheriff, on 17 April, 1831, had relation back to the time of the sale, and that her legal title accrued from that time. On the third point, the jury were instructed that if they believed from all the testimony taken together, that A. Bowers bought the land *bona fide,* with his own money, and for his own use, he acquired a good title. But if they believed he bought it with the mon-
(105) ey of Morrice Baker, either in whole or in part, and for the benefit of the said Baker or his family, it was a

fraud on the creditors of Baker, and A. Bowers would acquire no title by such purchase. On the last point the jury were told, that if the testimony satisfied them, that A. Bowers had given express permission to G. Bowers, to levy his execution on the said land and sell it, it would be a waiver of A. Bowers' title, and in that case, Goss acquired a good title. But if the permission spoken of was only conditional, and the condition had not been complied with by G. Bowers, and Goss had no notice of such conditional agreement, before he purchased, the title of A. Bowers would not be affected thereby. The jury found a verdict for the lessors of the plaintiff, and the defendant, after an ineffectual motion for a new trial, appealed.

No counsel appeared for either party in this Court.

RUFFIN, Chief Justice: We think there is no error in the instruction to the jury, of which the defendant has the least cause to complain.

That lands bid off at a sale upon execution by one person, may be conveyed by the sheriff to another, by the direction of the purchaser, was held in *Smith v. Kelly,* 7 N. C., 507; and in *Shamburger v. Kennedy,* 12 N. C., 1. Whether the direction be by writing or parol does not concern the defendant in the execution, or those claiming under him. It is a question between the sheriff and his bargainee on the one hand, and the first purchaser on the other. The deed authenticates officially the fact of sale, and that fact is equally true as against the former owner, whether it be to A. or to B., and followed by the deed, divests the title of the former owner.

The relation of the sheriff's deed, so as to make it operate from the sale is also settled in a number of cases. *Davidson v. Frew,* 14 N. C., 1; *Pickett v. Pickett, Ibid,* 6; *Dobson v. Murphy,* 18 N. C., 586.

Upon the point of fraud the court gave the instructions prayed by the defendant; and indeed went beyond them, by saying, that if A. Bowers purchased with Baker's money, in whole, or in part, and for the benefit of Baker or his family, he would get no title against Baker's cred- (106) itors. This was certainly going to every length the defendant could desire; and further than we suppose is correct, unless there was an intention to deceive creditors by

claiming the purchase as an absolute one, when it really was only a security for that portion of the purchase money which Bowers advanced of his own. However, that point is out of the case at present; because, under the instructions, the jury must have found that Bowers purchased for himself *bona fide* and with his own money.

The evidence upon which the fourth point was raised, might have been quite material as a circumstance denoting the intent of the first purchase. But supposing A. Bowers to have purchased *bona fide* we cannot agree with his Honor, that even his unconditional consent to a second sale, by another creditor of Baker, extinguished his title. It does not appear, indeed, that this occurred prior to the directions of the sheriff to convey to the lessor of the plaintiff. But if it was, it could not operate to extinguish or transfer his title—being that to real estate; although it might be a fraud on G. Bowers which might sustain a personal action at law, or found relief in another tribunal. But even this point has been found as to the fact, against the defendant. There is, therefore, no reason whatever, to disturb the verdict, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Carter v. Spencer, 29 N. C., 18; *Brooks v. Ratcliff,* 33 N. C., 323; *Campbell v. Baker,* 51 N. C., 257; *Richardson v. Thornton,* 52 N. C., 460; *Isler v. Colgrove,* 75 N. C., 342; *Hall v. Hollifield,* 76 N. C., 477; *Young v. Griffith,* 84 N. C., 718; *Cowles v. Coffey,* 88 N. C., 343; *Ward v. Lowndes,* 96 N. C., 381.

(107)

BENJAMIN S. BRITTAIN v. NELSON G. HOWELL.

After the plaintiff has been permitted to go on and prepare his case for trial, the court will not, upon the motion of the defendant, make a peremptory order dismissing the suit for want of a prosecution bond, but will permit the plaintiff then to prepare and file such bond. The sole object of the bond is to secure the defendant; and the court will use its power in regard to it, so as to protect him, and advance the purposes of justice.

This action was brought in the Superior Court of Macon county, and the defendant appeared and plead in bar at the Fall Term of 1835. At the next term the trial was, upon affidavit, removed to Buncombe Superior Court, in which the transcript was filed at the Spring Term of 1836. In the last term, to-wit, the Fall Term, 1836, of Buncombe Superior Court, the defendant moved to dismiss the suit, because there was no prosecution bond on file. The plaintiff was not able to establish that he had given a bond to the clerk of Macon Court; but he then tendered in court a bond with sufficient sureties for the prosecution of the suit, which his Honor *Judge Dick* permitted him to file; and thereupon the motion of the defendant was overruled, and he prayed an appeal; which was allowed him.

No counsel appeared for either party in this Court.

RUFFIN, Chief Justice, having stated the case, proceeded: We regret that his Honor allowed so frivolous an appeal from an interlocutory judgment. If the statute positively commanded the suit to be dismissed for want of a prosecution bond, it would not mean that it should be done, unless the motion was made at a proper time—that is, before any steps have been taken in the cause preparatory to a trial. Doubtless, the Court will always see that the defendant is sufficiently secured in his costs, and at any stage of the case will direct a bond to be given within a reasonable time, and in default thereof, will dismiss the suit. But it would be a gross surprise to make a peremptory order of dismission, (108) after the defendant had suffered the plaintiff to go on for two terms in his own county, and reach the second term in Buncombe. The sole object of the bond is to secure the de-

fendant and the Court will use its power in regard to it so as to protect him and advance the purposes of justice. The bond tendered by the plaintiff fully answered those purposes. Bonds are thus taken in cases of *certiorari*. *Rosseau v. Thornberry*, 4 N. C., 326; and the sureties are charged as in appeals. *Lavender v. Pritchard*, 3 N. C., 337; *M'Culloch v. Tyson*, 9 N. C., 336. And an appeal bond even may be waived by going to trial. *Ferguson v. M'Carter*, 4 N. C., 544. In fine, the court will render effectual the purpose of the legislature in requiring a bond, by providing a proper indemnity at any stage of a cause; but justice must not be stifled by dismissing the suit, when the plaintiff offers to do the very thing the other side complains he has not done. The order of his Honor, we think is proper; and it must be so certified to the Superior Court. The defendant must pay the costs in this Court.

PER CURIAM. Judgment affirmed.

Cited: *Corn v. Stepp*, 84 N. C., 600; *McMillan v. Baker*, 92 N. C., 115; *Albertson v. Terry*, 109 N. C., 9; *Cooper v. Warlick*, *Ib.* 673.

AMBROSE K. WYATT, Chairman, etc., upon the representation of SAMUEL MAUDLIN v. MORDECAI MORRIS.

A covenant in an indenture of apprenticeship, under the act of 1769, (*Rev. ch. 69, s. 19*), to teach the apprentice to read and write, according to law, is not an engagement that the apprentice will, or shall learn to read and write And if the apprentice is incapable of acquiring the art of reading and writing, after proper means have been taken to teach him, the covenant is not broken.

The case of *Clancy v. Overman*, 18 N. C. 402, approved.

This was an action of Covenant upon an indenture, whereby the relator was, by an order of the County Court, bound apprentice to the defendant, until he, the relator,
(109) should arrive to the age of twenty-one years, and in which the defendant covenanted, among other things, to teach him "to read, write, and cypher, according to law." The breach assigned was, that the defendant had wholly

failed and neglected to teach the said relator to read and write. Pleas, covenants performed ; and covenants not broken.

Upon the trial at Perquimans, on the last Spring Circuit, before his Honor, *Judge Dick*, the relator proved, by several witnesses, that he had remained in the service of the defendant until his arrival at twenty-one years of age; that he was a young man of ordinary capacity, and that he could neither read nor write. The defendant, on his part, then proved, by one witness, that he had sent the relator to school as much as two quarters in each year, for ten years; and by another, that he, the witness, went to school with the relator between one and two quarters in each year, for four years, and that the relator went to school after witness had left it; that the relator could read a little, but very indifferently, and witness did not know whether he could write. Upon this testimony, the defendant's counsel requested the judge to charge the jury, that, if the relator's inability to read and write arose from incapacity, or from unwillingness to learn, the defendant was entitled to their verdict; but his Honor refused so to instruct the jury, but charged them, "that as the defendant had entered into a positive and unconditional covenant under his hand and seal to learn the relator to read and write, if the evidence satisfied them that the relator could not read and write at the expiration of his apprenticeship, he was entitled to recover nominal damages, at least. He further charged the jury, that if they believed the defendant's witnesses, and particularly his first witness, the relator had been sent to school a sufficient length of time to learn to read and write, and was only entitled to recover nominal damages." The jury returned a verdict for the plaintiff, and assessed the relator's damages to seventy-five dollars; and the defendant, after an ineffectual motion for a new trial, appealed.

(110)

Kinney, for the defendant.
Devereux, contra.

DANIEL, Judge: In the indenture of apprenticeship on which this action is brought, the defendant covenanted to teach the apprentice to "read, write and cypher, according to law;" meaning thereby to bind himself to perform the duty

required by the act of 1762, (Rev. ch. 69, sec. 19). This act, among other things, requires, that the master or mistress "shall teach, or cause him or her (the apprentice) to be taught to read and write." The engagement to teach, or cause the apprentice to be taught to read and write, is not an engagement that the apprentice will, or shall learn to read and write. The legislature did not mean to make the master or mistress an insurer of these improvements of the mind of the apprentice. All that is required, is a diligent and faithful exercise of the means necessary to effectuate the objects mentioned in the covenant. If the apprentice is incapacitated to acquire the knowledge of reading and writing, after due means have been taken to teach him, the covenant is not broken. The judge charged the jury, that the covenant was positive and unconditional, to learn the apprentice to read and write, and it, at the end of the apprenticeship, he could not do these things, the covenant was broken, and the relator was entitled to recover, although the apprentice was incapacitated to learn; that the circumstance of incapacity only went to mitigate damages. The case of *Clancy v. Overman,* (18 N. C., 402) is in conflict with this opinion of the judge, and seems to us to govern this case. We are of opinion, that a new trial should be granted.

PER CURIAM. Judgment reversed.

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(111)

The President and Directors of the STATE BANK v. NATHANIEL ROBARDS.

Where an agent had received money to pay off certain debts of his principal, and made a payment to the creditor, for which the principal was by mistake credited twice, such agent, in an action against him by the creditor to recover the amount of the mistake, cannot be rendered liable therefor, if it appears that he afterward had a settlement with his principal, and paid over to him the balance remaining in his hands, after being allowed for only what he had actually paid the creditor.

This was an action of assumpsit, in which a nonsuit was entered at Wake, on the last Spring Circuit, before *Settle J.,*

subject to the opinion of the court, upon the following statement of facts.

Willie Lewis, formerly of Granville county, was in the year 1828, largely indebted to the plaintiffs, on two notes, discounted at bank for his benefit. In that year he removed from the State, having appointed the defendant his agent and attorney, and placed in his hands a large amount of funds for the purpose of settling his business and paying his debts in this state. The defendant, as such agent, paid into bank, upon the account of his principal, fifteen hundred and sixty-seven dollars, which, by a mistake of the officer of the bank, was placed to the credit of Lewis, on both notes, thereby giving him, Lewis, the advantage of the same payment, twice. The notes, after being renewed from time to time by the defendant, in the name of his principal, were finally paid off by the defendant, 6 March, 1832. Lewis having died, the defendant, in September, 1832, had a final settlement with his executrix, and paid over to her the sum of one hundred and sixty-six dollars, the balance then remaining in his hands of the effects of her testator. In that settlement, the defendant was allowed credit only for the sums which he had *actually paid* in discharge of the two notes in bank. He also at that time surrendered his vouchers, and had not since had any of the assets of the estate of Lewis in his hands. The mistake in the entry of the above stated sum of fifteen hundred and sixty-seven dollars was discovered at (112) the bank in June, 1834.

His Honor, upon this case, refused to set aside the judgment of nonsuit, and the plaintiffs appealed.

No counsel appeared for the plaintiffs in this court.
W. H. Haywood and *Devereux,* for the defendant.

DANIEL, Judge, after stating the case as above, proceeded: The debt was originally contracted by Lewis, and the amount of the mistake is now the debt of his estate. The defendant personally never stipulated to pay it, although as agent he had renewed the notes at bank in the name of his principal. It was nearly two years after the defendant had closed his agency, and paid the balance of the funds in his hands to the executrix of his principal, before the mistake was discovered,

or any demand made of the defendant concerning the same. In an action for not paying over money paid to the agent for a plaintiff, defendant may show that the plaintiff, by his conduct, did not consider the defendant as holding the money on plaintiff's account; and that the defendant appropriated the money properly to other purposes, before the plaintiff called on him for it. *Stewart v. Fry,* Holt, 372; 1 Saund. P. & E., 86. These, and the authorities referred to by the defendant's counsel, show that the bank cannot sustain this action against the defendant. We think that the nonsuit was proper, and that the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

(113)

JOHN SWINK v. JOHN FORT.

By the act of 1715, (*Rev. ch. 2, s. 5,*) one year is the limitation to an action of trespass *vi et armis* to personal property.

This was an action of trespass *vi et armis,* brought to recover damages for killing the plaintiff's horse. Pleas, general issue, and the statute of limitations. Upon the trial at Anson, on the last Circuit, before his Honor Judge *Saunders,* the jury returned the following special verdict: "On the first issue, the jury find the defendant guilty of the trespass in killing the plaintiff's horse. On the second issue, they find the killing was more than twelve months, but within three years, before the commencement of the action." Upon the finding on the second issue his Honor rendered a judgment for the defendant, and the plaintiff appealed.

Mendenhall, for the plaintiff.
Winston, for the defendant.

DANIEL, Judge: This is an action of trespass *vi et armis* on *personal property.* The question is, whether the action is limited and barred by the act of 1715, within one year, or three years after the cause of action arose. The legislature, in the *first* branch or part of the fifth section, enumerates the personal actions intended to be limited; and trespass is one of them. In the *second* part of the same section, the leg-

islature points out what actions shall be brought in three years from the time the cause of action arose; and among those enumerated, there is one species only of the action of trespass particularly mentioned; it is trespass *quare clausum fregit;* which clearly shows that every other species of the action of trespass *vi et armis* is excluded from the operation of this branch of the section. Then comes the *third* branch of the section, which runs thus; "and the said actions of *trespass,* assault and battery, wounding, imprisonment, or any of them, within *one year* after the cause of such action or suit, and not after." The counsel for the plaintiff contends, that the actions of trespass spoken of in this (114) last branch of the section, means trespass to or upon the *person only,* and not actions of trespass on *personal property.* The answer to this argument is, that the legislature clearly intended that the action of trespass, as a *genus,* should be limited as to time. This is evident, from the first words of the section, which begins thus, "all actions of *trespass,* detinue, &c." Of this action, only one species, namely, *trespass quare clausum fregit,* is comprehended among the actions which are required to be brought within three years. If, therefore, the words, "said action of trespass," mentioned in the last branch of the fifth section, should be construed to relate only to actions of trespass on the *person,* then there would be no limitation of time at all, as to actions of trespass on *personal property;* which construction, we think, would be directly against the intention of the legislature, as declared in the beginning words of the section. Our act of limitation is different in several respects from the British statute of James I., beside the cutting down of time. We do not perceive that there has been any mistake in the transcribing or printing the act of 1715, as it now stands in the Rev. Code. Swan and Iredell, in their revisals of the acts of assembly give us the act of limitations in the same words, and with the same punctuation.

We are of the opinion that the judgment was correct, and must be affirmed.

PER CURIAM. Judgment affirmed.

NOTE.—The limitation to actions of trespass on personal property is altered by the revised statutes, and is put upon the same footing with the limitation to trespasses upon real estate.—REP.

(115)

JOSEPH J. ALSTON v. CHARLES HAMLIN.

1. The act of 1806 (*Rev. c. 701*) having been enacted on purpose to exclude all parol evidence of a gift of slaves, necessarily avoids every parol estoppel that might be set up to defeat its operation.

2. Where the owner of slaves made a parol gift of them to his son-in-law, who bequeathed them to his children, and died leaving his father-in-law executor of his will and guardian of his children, *it was Held*, that the taking possession of the slaves and hiring them out, first as executor and then as guardian, was not a possession adverse to the title of the father-in-law; and that the statute of limitations did not begin to run against him until he had permitted a division of the slaves between his grandchildren, and delivered them over.

3. If arbitrators to whom a question is referred, decline rendering a judgment, and only declare an opinion upon it; or if mistaking the subject submitted, they adjudicate not on the controversy of title between the parties, but on the conflicting claims between one of the parties and a third person, the parties will not be bound thereby because in the one case, there is no award; and in the other it is no on the matter submitted.

4. A letter written by the plaintiff, with the concurrence of the defendant, to two persons, calling upon them to say how he (the plaintiff) ought to dispose of certain slaves, which he had given since 1806, by parol, to his deceased daughter and son-in-law, between his granddaughter and the defendant, who had married another grand-daughter, that had died, is not a submission to arbitration of the plaintiff's *title* to the slaves in question; and no expression of opinion of the persons called on, in what form soever made, can be obligatory upon the plaintiff's title to such slaves.

5. The acceptance of a legacy under a will, will not at law, prevent the legatee from setting up any claim which he may have to property bequeathed to another person in the same will.

6. The Superior Court may in its discretion permit the plaintiff to amend his writ after a verdict in his favor, and the Supreme Court has no right to supervise the exercise of such discretion.

This was an action of Detinue for four slaves by the names of Viney, Barney, Areny, and Dorcas. Pleas *non detinet*, statute of limitations, arbitrament and award. Upon the issues joined on these pleas, the case was tried at Chatham, on the last Spring Circuit, before *Donnell, J.*, when the following facts appeared in evidence.

In 1814, John B. Mebane, intermarried with a daughter of the plaintiff, upon which the plaintiff sent to him
(116) several slaves, among whom was the woman Viney now sued for, and another woman who bore the other

slaves in question while in the possession of the said Mebane. There was no written transfer of the said slaves to the son-in-law, but they continued in his possession until his death in 1820, when besides the slaves sent him by the plaintiff, he had some others which had been put into his possession by his own father, and one which he had purchased himself, amounting in the whole, to not more than thirty-two. In July of that year the said John B. Mebane made his will, in which were contained the following clauses:

"I give and bequeath to my two daughters, Cornelia and Martha, and their heirs forever, the following property, to be equally divided between them, whenever either of them shall marry, or come to lawful age, viz: all my land, with its appurtenances, the whole of my negroes, with their increase until that time; If I mistake not at this time, thirty-two in number." "Item, I give and bequeath to my father, John Mebane, and to my father-in-law, Joseph John Alston, each, the rifle gun which I had from them." Of this will the testator appointed his father and the plaintiff executors, who proved the same at August Term, 1820, of Chatham County Court, and immediately took possession of all the slaves above mentioned, and hired them out until the year 1827, advertising them as belonging to the estate of their testator, and taking the notes for the hire, payable to themselves as executors. The notes for the hire were also returned in the inventory filed by the executors as part of the estate of their testator. From 1827 to the year 1832, the plaintiff and John Mebane continued still to hire out the said slaves, not as executors, but as guardians to their testator's children. During the life time of the testator, he had frequently recognised the right of the plaintiff to the slaves sent to him by the plaintiff, and on his death bed had declared to the plaintiff that he had given the said slaves to his children, but he knew he had no title to them; upon which the plaintiff replied that "your will is my will." It appeared that the rifle gun bequeathed to the plaintiff, had been received by him, and appropriated to his own use. (117)

The testator, John B. Mebane, survived his wife, the plaintiff's daughter, and left only two children, to-wit, the daughters mentioned in his will, with one of whom, (Cornelia) the defendant intermarried in the year 1831. In Jan-

uary, 1832, three persons were selected by the guardians of the children and the defendant, to make a division of the slaves of which John B. Mebane died possessed, together with their increase. A division was accordingly made, and the plaintiff, one of the guardians, being present thereat, delivered to the defendant in right of his wife, one moiety of the said slaves, including those in dispute, as his property, under the will; and the defendant accepted them, took possession of them, and retained them, claiming them as his own. In July 1832, the defendant's wife died without issue and in October, 1833, the plaintiff demanded the slaves Viney, Barney, Areny, and Dorcas, of the defendant, and upon his refusing to deliver them, brought this suit in 1834.

In relation to the question of arbitration and award, it appeared from the testimony of several witnesses who deposed to conversations between the parties, and from several letters written from one to the other, that before the suit was brought, there was a proposition between the plaintiff and defendant, to refer the controversy relative to the said slaves to arbitrators. After the conversation referred to by the witnesses, a letter (marked E,) was addressed by the plaintiff to Joseph Ramsay and Green Womack, and was sent by the plaintiff's son, who was to attend on behalf of the plaintiff, and who was accompanied by the defendant. A witness who was present when this letter was written, stated that he understood from the conversation between the plaintiff and defendant that the matter was submitted to Ramsay and Womack on the terms stated in the letter, which was in these words:

"Jan'y 15th, 1833. Messrs. Jos. Ramsay and Green Womack. An occurrence has taken place in my family which is a delicate one with me, so much so, that I feel unwil- (118) ling to decide on it without having the opinion of some of my acquaintances on the subject. I have, therefore, in conjunction with Mr. Hamlin," (the defendant) "selected you two gentlemen as proper persons, and should you not agree, to make choice of some other person. The circumstance is this. Mr. Charles Hamlin, who married Cornelia Mebane, seems to think that the property of his deceased wife ought to be his. And as I have never made a conveyance to any person, the painful duty devolves on me to say how it shall be disposed of; whether to Mr. Hamlin, or to Martha

Mebane, the only surviving child of John B. Mebane, deceased; that being the case, I hope you will be so obliging, for my satisfaction, to say in what manner you think the property would be righty and properly disposed of. Your compliance, gentlemen, I do assure you, would greatly relieve my mind, and ever lay me under obligations to you. Mr. Hamlin has received one half of the hire of the negroes from the death of John B. Mebane to the present time.

Yours, &c.,

JOS. JNO. ALSTON."

Mr. Ramsay was called as a witness, and stated that he acted entirely upon the contents of this letter, not knowing of any other authority, or terms of submission to him and Mr. Womack—that they having called in a third person, had accordingly considered the matter understood to be in controversy between the parties, as stated in the said letter, marked E, and decided that the negroes should go to the defendant—that this decision was addressed to the plaintiff in the form of a letter signed by him, Ramsey, and Womack, and sent to the plaintiff by his son who had brought the letter E; that no copy or duplicate was made of the letter containing the said decision; that he considered himself as acting as an arbitrator; and that he decided altogether upon the contents of the letter E; and that he understood it was a controversy between the defendant and his wife's sister. He stated further that they did not consider themselves as deciding on the plaintiff's right, not supposing that matter referred to them, and therefore not considering it. The letter containing (119) the decision was not produced on the trial, but its contents were proved by the witness Ramsey. Mr. Womack was also called, and testified substantially the same with Mr. Ramsey; stating further, however, that when the letter containing the decision was handed to the plaintiff's son and the defendant, he told them that he did not consider the decision final, but merely as an opinion, as requested in the plaintiff's letter to Ramsey and himself.

Upon these facts the defendant's counsel contended. 1st. That the possession of the slaves in question by John B. Mebane, till his death; his bequest of them to his children; the qualification of the plaintiff as one of the executors of the

will; the receiving by the plaintiff of the rifle bequeathed to him by the will; the hiring out of the slaves from the death of John B. Mebane till the end of the year 1831, first as one of the executors of the said Mebane, and afterwards as guardian to his children; inventorying the hire of the said slaves as part of the testator's estate, and accounting therefor to his children; the assenting to the division of the said slaves after the marriage of the defendant with one of the children, and delivering over the defendant's share to him, estopped the plaintiff from claiming the said slaves from the defendant.

2dly. That the plaintiff was barred by the statute of limitations, on account of the length of time the slaves were hired out by the plaintiff and John Mebane, as executors of John B. Mebane, and as guardians to his children.

3dly. That the plaintiff, having received the legacy of the rifle, and treated the slave bequeathed to his grand-children as their property, had thereby assented to the legacy to them of the said slaves; and had elected to take the legacy given him in the will in lieu of his property in the slaves.

4thly. That the plaintiff's right to the said slaves, was barred by the award of Messrs. Ramsey and Womack, in favour of the defendant, upon the submission of the
(120) matter in controversy to them. Upon this point the counsel for the defendant presented two views in their arguments to the jury; contending in the first place, that from the whole evidence in the case, and more particularly from the letters and conversations between the parties in reference to a submission of the matters in controversy to arbitration, the jury would be well warranted in finding that the parties had agreed to refer the matter to arbitrators, to make a final award between them; that it was not necessary that the reference should be in writing; that in pursuance of the agreement, Ramsey and Womack were appointed such arbitrators; that the letter marked E, of Alston to the arbitrators, was merely a statement of his views of his own right, and could not be considered as containing the terms of the submission, being signed only by Alston, and in the form of a letter to the persons selected as arbitrators; that in pursuance and by authority of the agreement and submission made between the parties, the said arbitrators, Ramsey and Womack, had made an award in favour of the defendant, which was in law final and

conclusive of the right of property in the slaves; and that although Ramsey and Womack were not informed of the agreement of submission, but supposed themselves acting merely upon the letter addressed to them by the plaintiff, and although they supposed their decision not to be final or conclusive of the plaintiff's rights, yet, that in law, it had become so, being founded on an agreement between the parties to refer the matter in controversy to their decision, and that decision having been made by them. The other view presented upon this point by the counsel, was, that if the letter of the plaintiff to Ramsey and Womack, contained the terms of the submission as agreed upon by the parties, the decision of those gentlemen in pursuance of such submission in favour of the defendant's claim to the slaves, was conclusive on the plaintiff, and supported the plea of arbitrament and award, and entitled the defendant to a verdict thereupon.

His Honor upon the three points charged the jury adversely to the position contended for on behalf of the defendant. On the fourth, he instructed them that if, from the evidence in the cause, they could collect that such a con- (121) tract or agreement to refer the matter in controversy to arbitrators had been made between the parties, as that contended for by the defendant's counsel in argument, and that in pursuance of such contract of submission, arbitrators were appointed, and awarded or decided the matter in favour of the defendant, it was in law, a bar to the plaintiff's right of property in the slaves, and entitled the defendant to a verdict; and this, although the contract of submission was not reduced to writing: and that if Ramsey and Womack were the persons selected by the parties, in pursuance of such contract of submission, their decision in favour of the defendant was equally conclusive upon the plaintiff, if they acted under the authority of, or in conformity to, such contract of submission, although they did not know at the time, the precise terms of the agreement; and that their views as to the legal effect of their decision, though they may not have thought it final, would yet not render it less conclusive upon the plaintiff in point of law. But on the second view presented by the defendant's counsel in argument, if the jury should be unable to find from the evidence in the case, any other agreement of submission or reference by the plaintiff, than that contained in his letter to

Ramsey and Womack, before referred to, and if they found that said letter did contain the terms of said submission between the parties, then the decision of those gentlemen, in pursuance of such reference, did not conclude the plaintiff, or affect his right or title to the slaves in controversy, if he should have succeeded in making out a title in himself.

As to two of the slaves in question, another ground of defence was taken on the trial, to-wit, that the said slaves were named in the writ, Vicy and Amy, instead of Viny and Areny, and it was insisted, that such was the correct reading of the writ and that it was the duty of the court to inspect the writ and instruct the jury that the slaves, Viny and Areny, not being sued for, no verdict could be given for them. For the plaintiff it was contended, that the names in the writ were
(122) meant for Viny and Areny, and that such was its true reading. It not appearing that the said slaves were known by any other names than Viny and Areny, his Honor directed the jury to inspect the writ for themselves, and charged them, that unless the names therein contained, were the names Viny and Areny, the plaintiff would not be entitled to a verdict for those two slaves, although he might be entitled to a verdict for the others mentioned in his writ. A verdict was rendered for the plaintiff for all the four slaves, Viny, Barney, Areny and Dorcas. The defendant's counsel moved for a new trial; first, because of misdirection by the Court, in the charge to the jury; and secondly, because the objection made to the writ ought to have been decided by the Court, and not referred to the jury. His Honor gave leave to the plaintiff to amend the writ, by writing the names Viny and Areny, plainly and legibly, and then overruled the defendant's motion for a new trial, and rendered a judgment; from which the defendant appealed.

W. H. Haywood, Badger and *Iredell* for the defendant.
Waddell and *Devereux* for the plaintiff.

GASTON, Judge: We see no error in this case, on which to reverse the judgment. The estoppel, which was attempted to be set up, does not vary from that which was ineffectually urged in the former suit between the same parties. *Hamlin v. Alston,* 18 N. C., 479. We then held, and we think held

properly, that the act of 1806 (Rev. c. 701), having been enacted on purpose to exclude all parol evidence of a gift of slaves, necessarily avoided every parol estoppel that might be set up to defeat its operation. The statute of limitations could not protect the defendant, for his adverse possession did not commence before the slaves were delivered over to him, at the end of the year 1831, and this action was instituted in April, 1834. To so much of the Judge's instruction relative to the alleged award, as held—that if the jury could collect from the evidence, that the plaintiff and defendant had agreed to submit the matter now in controversy, to the decision of arbitrators, and the arbitrators had decided in favour of the defendant, such a decision was a bar to this action, although the arbitrators did not know the terms of (123) the submission, nor regard their decision as final—no exception could be taken by the defendant, for it is substantially such as he prayed for, and *at least* as favourable as he could have required. It is unnecessary for us, therefore, to examine into its correctness. We feel ourselves, however, bound to say, waiving altogether the inquiry, whether a parol submission could conclude the question of title, that if the instruction can be understood as holding, that if this question was submitted to the decision of the arbitrators, and the persons so appointed to decide, declined to render a judgment, but only declared an opinion upon it; or if, mistaking the subject submitted, they adjudicated, not on the controversy of title between these parties, but on the conflicting claims of the defendant and his deceased wife's sister, so understood, we apprehend it would be erroneous. In the one case there was no award; in the other, the award was not on the matter submitted. As to the residue of the instruction in relation to the award, we entertain no doubt of its correctness. If the letter E, addressed to Messrs. Womack and Ramsey, contains the terms of the submission, it is indisputable, that the question of title between the plaintiff and defendant was not submitted to adjudication. According to that letter, these gentlemen were called on as disinterested friends, to give their opinion to the plaintiff, on a matter which he conceived himself competent to decide, but which, from considerations of delicacy, he was unwilling, of himself, to determine how he ought to execute the painful duty which had devolved on him, of dis-

posing of the negroes which he had given to his daughter, the wife of John B. Mebane, but which he had never conveyed, and which therefore remained, in law, *his* property, whether wholly in favour of the surviving child, or partly in favour of the husband of the deceased child of such son-in-law. No expression of opinion, by these gentlemen, in what form soever made, could be obligatory upon this submission.

If the defendant can avail himself of the implied election which was insisted on at the trial, it must be before a tribunal, competent to decide upon the equity of such election.

(124) The principle of election, as here asserted, is a principle of equity, proceeding on the doctrine of an implied condition, of which a court of equity, *in a proper case,* will enforce the performance, by compelling the legatee, if he elects to take the bequest, to make compensation out of his own property to the disappointed legatees. In the will, there is no condition expressed, that if the plaintiff take the rifle, he shall relinquish these negroes to the testator's children. Without stopping to inquire what would have been the effect of such a condition, had it been expressed, it is, in this case, clear, that the *law* has not taken away these negroes from the plaintiff, because he accepted of this legacy.

In regard to all that is stated in the case, as to the supposed mistake in the writ, it is enough to say, that the court had a discretion to amend the writ, and that we have no right to supervise the exercise of that discretion.

PER CURIAM. Judgment affirmed.

Cited: Overby v. Harris, 38 N. C., 258; *Branch v. Goddin,* 60 N. C., 495.

(125)

JOHN A. KNIGHT et al. v. STEPHEN WALL.

1. Where a legacy is given to a described class of individuals, as to the children of A. B., and no period is assigned for the distribution of it, the persons answering this description, at the death of the testator—that is, the children of A. B., then in existence, or legally considered as then in existence—are alone entitled to the bequest. But when the enjoyment of the thing given is not to be immediate, but is postponed to a particular period, as at the death of A. B., and there are no special provisions in the will indicating a different intent, then not only those who answer the description at the death of the testator, but those who come into being after his death, and before the time when the enjoyment is to take effect, so as to answer the description at any time before that assigned for the distribution, are all entitled to take: and if any thus entitled to take die before the period of distribution, and there are no words in the will indicating an ulterior disposition of their interests, as to the survivors, they are vested interests, and are transmitted to their representatives.

2. A bequest by a testator of a negro girl and her increase to his daughter, for life, and after her death, that "the girl shall go to the children" of his daughter, will carry the increase of the negro girl, as well as the girl herself to the children, after their mother's death, although such increase are not mentioned in the bequest over, unless it appears from other parts of the will, that the testator intended otherwise.

3. A copy of a will made in another state, with its probate certified by the judge of the court in which it was proved, and accompanied by the testimonial of the Governor of that State, that the person who gave that certificate, was the proper officer to take such probate, and to certify the same, is a sufficient authentication of the will, under our act of 1802, (*Rev. ch. 623,*) to authorize its reception as evidence in our courts.

4. No demand is necessary to be shown, in order to sustain the action of detinue for slaves, where it appears, that when the action was brought, the defendant held and claimed them as his own property. But if it were necessary, a demand made by one of several plaintiffs would be sufficient, where it was not objected to by the defendant at the time it was made.

5. A title to slaves cannot be acquired by a parol estoppel.

This was an action of Detinue for a negro woman slave named Grace, and her four children, Juno, Beck, Wisdom, and Wesley, tried at Anson, on the last Circuit before *Saunders, J.*

The plaintiffs claimed title under a paper writing, purporting to be the last will and testament of William Hicks, who resided in the state of South Carolina, and died there, in the

year 1791. A copy of this writing, together with its
(126) probate, certified by the judge of the Court of Ordinary, where the same was proved, and accompanied by the testimonial of the Governor of the state of South Carolina, that the person giving the certificate was the proper person to take such probate, and to certify the same, was offered in evidence by the plaintiffs, and objected to by the defendant, upon the ground that it was not properly authenticated; but was received by the court. This will contained the following clauses: "Unto my daughter Obedience I do give and bequeath one negro girl named Hannah, during the said Obeddience's natural life, and after her decease, the said girl shall go to the said Obedience's children. Unto my daughter Frances I do give and bequeath one negro girl named Grace, and her increase, during the natural life of the said Frances, and after her decease, the girl shall go to the said Frances's children. Unto my daughters Elizabeth and Martha, I do give and bequeath one negro woman named Rose, and child, Flora, in the following manner—the said Rose and child, as likewise her increase, to remain in possession of my executors, to support my above named daughters, till the time that my daughter Martha shall be fourteen; and then she, the said negro, and her increase, shall be equally divided between my said daughters Elizabeth and Martha." Prior to the death of the testator, his daughter Frances had intermarried with Moses Knight, and had two children, to-wit, Benjamin Knight, and Anna, afterwards married to Daniel M'Intosh; and after the death of her father, the said Frances had four other children, to-wit, John A. Knight, Elizabeth, afterwards married to Caleb Curtis, Frances, afterwards married to Cullen G. Britt; and Sarah Knight. Of these children, Benjamin and Sarah died in the lifetime of their mother, who died in May, 1828, about eleven months before the commencement of this suit. The action was brought in the names of the surviving children, together with the husbands of the females, and the administrators of Benjamin and Sarah Knight, deceased, to recover from the possession of the defendant, the negro girl,
Grace, mentioned in the will of William Hicks, and
(127) some of the children which she had borne since the death of the testator. For the plaintiffs it was contended, that by the bequest in the will above-mentioned, to the

testator's daughter Frances, she took a life estate in Grace and her increase, and that after the death of the said Frances, Grace and her increase became the property of the said Frances's children; but it was objected by the defendant, that the girl Grace only, and not her increase, was given to the children of the said Frances after her death; and his Honor was requested so to charge the jury, which he refused. The defendant objected also, that there was a misjoinder of plaintiffs, and moved for a nonsuit upon that ground, contending, that as Sarah Knight was born after the death of the testator, and died before her mother, no interest under the said bequest vested in her, and that consequently her administrator was improperly made a party; and that as Benjamin Knight also died before his mother, his representative was likewise improperly joined in the action, as one of the plaintiffs. This point was reserved by his Honor, and subsequently decided against the defendant. The defendant set up title to part of the slaves in question under a judgment and execution against Moses Knight, the husband of the legatee for life; and to the remainder under a purchase at a sale made by a trustee to whom the said Moses Knight had conveyed them for the purpose of securing the payment of certain debts; and it was contended for the defendant, that having acquired the possession of the said slaves legally, it was incumbent on the plaintiffs to show that they had made a proper demand before the bringing of their suit. To prove that such a demand was made, the plaintiffs introduced a witness, who testified, that in September, 1828, he went with John A. Knight, one of the plaintiffs, who said to the defendant, "I demand of you Grace, Juno, Beck, Wisdom, and Wesley," to which the defendant made no reply. For the defendant it was insisted, that as John A. Knight was not alone entitled, it was necessary that the demand should have been made by the authority or with the assent of all the plaintiffs, and that this must be shown in evidence to the jury; and his Honor was requested so to charge. The defendant then introduced testi- (128) mony to show, that the slaves in question had been for many years in the possession of Moses Knight, who had kept and used them as his own; that they were generally regarded in the neighbourhood as his property; that at the sale made by the trustee aforesaid, one of the plaintiffs was present, and

bid for one of the said slaves, and another plaintiff, in answer to an inquiry about the title, said, that he knew of no adverse claim to that of Moses Knight; and the defendant proved further, that two of the plaintiffs then held two of the children of Grace born after the death of the testator, as their own property, under titles acquired from Moses Knight, in his own right. From this the defendant contended, that as the plaintiffs claimed under a written instrument, they were presumed in law to be cognizant of its contents, and that therefore their conduct was deceptive and fraudulent towards him, and that they were thereby estopped from setting up a claim to the said slaves. His Honor instructed the jury, that as to the demand, if they were satisfied from all the evidence in the cause, that it was made by John A. Knight, under the authority and with the assent of the other plaintiffs, and the defendant did not then object to the authority, but held the slaves in his possession, it was a sufficient demand to sustain the plaintiffs' action: and as to the question of *fraud,* that although the presumption might be that every person who had a written title to slaves, knew of the existence of that title, and that although two or more of the plaintiffs might have been at the sale of the said slaves, and then expressed the opinion, that the title of Moses Knight was good, yet if the jury should believe that the plaintiffs were really ignorant of their rights, and acted honestly in what they said and done, they could not be chargeable with such a fraud, as to affect their rights. A verdict was rendered for the plaintiffs, and the defendant appealed.

Badger, for the defendant.
Devereux, for the plaintiffs.

GASTON, Judge, after stating the case, proceeded: It may well be questioned, whether the refusal of the non-
(129) suit and of the instruction prayed for, brings before this Court matters proper for its consideration. The will was made in South Carolina, and all disputes about its interpretation should be determined by the law of South Carolina. The courts of this state do not know the law of other states, and a controversy respecting that law is ordinarily one of fact, which must be decided on evidence by the jury,

under the instruction of the court. *State v. Jackson,* 13 N. C., 563. The only exception to this principle, that we are aware of, is to be found when the plea of *nul teil record* is pleaded to a judgment, or other proceeding of a court of record in another state; when, from the necessity of the case, the court to whom it is exhibited must pass not only upon the existence of the supposed record, but upon its legal effect. *Carter v. Wilson,* 18 N. C., 364. It does not appear that any evidence was offered in this case of the law of South Carolina; but as the counsel on both sides have argued these points upon the construction of a will made in North Carolina, both assuming as a fact, that the law of South Carolina is the same with ours, we have examined the points, and shall declare our opinion upon them.

The objection of a misjoinder of plaintiffs seems to us unfounded. It assumes, that one of two constructions might be put upon this will. It assumes, that the word "children" either comprehends such only of the children of the testator's daughter, as were in being at the death of the testator—and if so, those subsequently born had no interest in the subject given—or it comprehends those who were in being at the death of the legatee for life, and in that event the representatives of the children who died in her lifetime—or at all events the representatives of Sarah Knight, who was born after the death of the testator, and died before the legatee for life—have been improperly joined as plaintiffs. We understand the rules applicable to words of this description to be well settled. Where a legacy is given to a described class of individuals, as to the children of A. B., and no period is appointed for the distribution of it, as the legacy is *due* at the death of the testator, and the two years allowed to the executor for settling the estate are given but for the (130) convenience of the estate, the rights of the legatees are settled and determined at the death of the testator. Unless, therefore, something else appears in the will to indicate a different intent, the persons answering the description at his death, that is to say, the children of A. B. then in existence, or legally considered as then in existence, are alone entitled to the bequest. When the enjoyment of the thing given is not to be immediate, but is postponed to a particular period, as at the death of A. B., and there are no special provisions in

the will indicating a different intent, then not only those who answer the description at the death of testator, but those who come into being after his death, and before the time when the enjoyment is to take effect, so as to answer the description at any time before that assigned for the distribution, are all entitled to take. In the latter case all are embraced, because no inconvenience can result from taking them in, and each one of the family of children is supposed to have been comprehended by the testator within such general words. If any thus entitled to take, die before the period of distribution, and there are no words in the will indicating an ulterior disposition of their interests, as to the survivors they are vested interests, and transmitted to their representatives. This was held in the case of *Devisme v. Mello,* 1 Bro. Ch. Ca. (appendix), 537, with respect to the interest of one in being at the testator's death, and dying before the legatee for life. On the same principle it follows, that this transmissible character is impressed on the interest of one coming into being after the testator's death, and predeceasing the legatee for life. But this conclusion does not rest on principle only; it has been sanctioned by several decisions. In *Spencer v. Bullock,* 2 Ves. Jr., 687, it was recognized as the established rule by the Master of the Rolls, though because of peculiar provisions in the will, he held the rule not applicable to the case before him; but in *Taylor v. Langford,* 3 Ves., 119, a case in point, he not only admitted the rule but applied it. *Malim v. Barker,* 3 Ves., 151; *Middleton v. Messenger,* 5 Ves., 140, and *Walker v. Shore,* 15 Ves., 124, are also direct authorities upon the point.

(131) We are also of opinion that construing the clause in question by the law of North Carolina, the Judge could not give the instruction which was asked for by the defendant. From the first settlement of our state, it has been a rule of property in limitations of slaves to one for life, with remainder to another, that the remainder carries the increase with the slaves, and vests the property thereof in him to whom the remainder is limited. Whether this rule was adopted in order to compensate the remainderman for the deterioration of the parent stock by age whilst in the service of the temporary owner; or was founded on customs and legal notions brought into the infant colony of emigrants from Virginia,

who were among its earliest settlers—it has been held as one particularly convenient for making a future provision in slaves, always regarded as far more valuable and permanent than other personal property, suited to the exigencies of growing families. According to this rule, the increase of Grace, as appurtenant to, and in legal contemplation, a part of Grace, became the property of the ulterior legatees, subject to the temporary interest of their mother, unless it could be clearly collected from the will that the testator *excluded* the increase from the gift of the parent stock. Upon this will such an intention is not to be collected. It is true that the increase are mentioned in the bequest for life, and are not mentioned in the bequest of the remainder; but the expression of what the law implies is but superfluous; and the omission to mention with the thing given, that which the law annexes thereto, and considers as a part thereof, furnishes no reason to reject the legal sense of the gift. Besides, if the testator did not dispose of the increase in this clause, what did he *intend* should become of them? The first legatee, his daughter, could enjoy them only her life; for so he *expressly* declares—if not given to her children, then *upon her death,* they must fall into the residue, but this dead daughter is one of those to whom the residue is given. Is there not a moral certainty that he did not *intend* this? No aid is furnished in support of the construction set up by the defendant by a recurrence to the other clauses of the will. In a former clause a negro girl Hannah, is given to the testator's daughter Obedience (132) for life, and after her death, to the children of Obedience, and the word "increase" is not used at all. In a subsequent clause, two negroes, Rose and Flora, are directed to remain in the possession of his executors, until his daughter Martha shall attain fourteen years of age, and then to be divided between his daughters Elizabeth and Martha; and in this clause the term "increase" is used *both* in the special and in the ulterior disposition. On a comparison of these clauses, it seems to us apparent, that sometimes the testator omits the term "increase," and sometimes inserts it, when in all he intends the increase to pass.

The other exceptions mentioned in the record, and not argued here, could not have been maintained. The instrument offered in evidence as the will of William Hicks, and its

probate, were duly authenticated, according to the requirements of our act of 1802, (Rev. c. 623) and therefore they were properly received in evidence. At the time when this suit was instituted, the defendant held and claimed the negroes sued for as his property, and therefore, no demand was necessary; but if a demand had been necessary, a sufficient one was fully proved, if the jury credited the testimony. The alleged estoppel was of no avail for many reasons. It is enough however to say, that a title in slave property cannot be made out by a parol estoppel. If any fraud were practiced on the defendant by the plaintiffs, or any of them, he must seek redress as he may be advised; but such fraud transferred to him no legal title in the slaves. In the present case, however, the fact as to the supposed fraud was, and as we think unnecessarily, submitted to the jury, and by their verdict they have negatived it.

PER CURIAM. Judgment affirmed.

Cited: Jones v. Green, 20 N. C., 490; *Vanhook v. Vanhook,* 21 N. C., 590; *Petway v. Powell,* 22 N. C., 312; *Wallace v. Cowell,* 25 N. C., 325; *Means v. Means,* 26 N. C., 197; *Miles v. Allen,* 28 N. C., 90; *Covington v. McEntire,* 37 N. C., 318; *Drake v. Merrill,* 47 N. C., 376; *Hooker v. Moore,* 50 N. C., 136; *Chambers v. Payne,* 59 N. C., 278; *Hilliard v. Outlaw,* 92 N. C., 269; *Moody v. Johnson,* 112 N. C., 802; *Knight v. Leak, post* 137.

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(133)

JOHN A. KNIGHT et al. v. FRANCIS T. LEAK.

1. A vested remainder in slaves may be sold during the life of the tenant for life, under a *fi. fa.* against the person entitled to such remainder

2. Upon an execution against A. and B., if the sheriff levies upon and sells a certain slave, who was in the possession of A , as the absolute property of A., and in the bill of sale describes the slave as the property of A , the interest of B in such slave, will not pass by such sale, though, in fact, A. had only a limited interest in the slave, and B. was entitled to the absolute property in remainder.

Detinue for a slave named Bob, brought by the same persons who were plaintiffs in the preceding case of *Knight v.*

Wall, and tried at the same time. One question was presented in this case, arising upon an exception to the charge of the Judge, by the defendant, besides those that were raised in that case.

William Hicks, by his last will, bequeathed a negro girl, Grace, to his daughter Frances, for life; and after the death of the said Frances, to her children. Frances, the legatee for life, was the wife of Moses Knight, who, by the assent and delivery of the executors of Hicks, took possession of Grace; and Bob, the slave in controversy, was born of Grace, while thus in his possession. A judgment was rendered against the said Moses Knight, and also Caleb Curtis and Daniel M'Intosh, and a *fi. fa.* duly issued thereon, to the sheriff of Richmond county. At this time Mrs. Knight was yet alive, and the persons having a vested interest in remainder in the slave Bob, were her four children, and the representatives of two children, who were dead. Anna M'Intosh, one of the plaintiffs and one of these children, was the wife of the said David McIntosh; and Elizabeth Curtis, another plaintiff, and also one of these children, was the wife of the said Caleb Curtis. This suit, upon the death of Mrs. Knight, was brought by all the living, and the representatives of the deceased children, and the defendant set up a title to Bob, under a purchase from the sheriff, at a sale under the said execution and exhibited as evidence of his purchase, the bill of sale of the sheriff. The defendant insisted that under this bill of sale, he had acquired, not only the tem- (134) porary interest of Moses Knight, but the interests in remainder of Mrs. M'Intosh and Mrs. Curtis, and therefore the present action could not be maintained against him. The bill of sale recited the execution, and that, by virtue thereof, the sheriff "did levy on a certain negro boy by the name of Bob, about fourteen years old, the property of Moses Knight, and having advertised, according to law, did expose the same to sale at the Court-house to the highest bidder, when Francis T. Leak became the highest and last bidder, at the sum of three hundred and thirteen dollars, twenty-five cents;" and then the sheriff's deed proceeded to declare that "in consideration of the said sum paid by the said Leak, I hereby sell and convey the said boy to the said Leak." There was no other evidence given of the levy, but the defendant introduced

testimony to show, that John A. Knight, one of the plaintiffs, was present at the sale, and advised the defendant to purchase the boy Robert, saying that he was a fine boy, and that the title of Moses Knight was good; that the said boy was then sold absolutely, and that Curtis and M'Intosh were present at the sale, making no objection, but assenting thereto. His Honor was of opinion, and charged the jury, that nothing passed under this sale but the interest of Moses Knight, "which alone was sold, as appeared from the sheriff's bill of sale." To this opinion and instruction the defendant excepted.

Badger, for the defendant.
Devereux, for the plaintiffs.

GASTON, Judge, after stating the case as above, proceeded: Doubts have recently been entertained and expressed, whether a remainder in a chattel, can be sold on a *fi. fa.* These doubts arise because of the difficulty of making such a seizure of interests of this kind, as the law requires of sheriffs, in a levy of personal property, consistently with the right of possession in the present holder; and because of the necessity of actually exhibiting, at the time of sale, the chattel which is offered, or any interest in which is offered by the sheriff for
(135) sale. They are rendered more imposing, by a consideration of the sacrifices, almost unavoidable, in a sale of the right to a future enjoyment of a chattel, not only perishable in its nature, but so liable to be eloigned before the period of enjoyment arrives. These last suggestions would, no doubt, have great weight in interpreting the enactments of our act of 1812, (Rev. c. 830) in relation to the sale, under execution, of equitable interests, where the words of the statute do not clearly embrace them. But we believe that the rule of law is, that all vested legal interests of the debtor, which he himself can legally sell, in things which are themselves liable to be sold, under a *fi. fa.,* may also be so sold. Thus the goods of a pawner, or a lessor, in the hands of a pawnee or lessee, may be sold by the sheriff, subject to the present right of possession of the pawnee or lessee. 2 Tidd Prac. (8 ed.), 1042. Such has been the common practice in our state, and although we are not aware of any express adjudication affirming it, we have never heard of any judicial

disapprobation of it, and we are not at liberty to hold it as against law. How the sheriff is to cause the possessor and temporary owner to produce the property at the day of sale, is an inquiry with which we need not now embarrass ourselves, as in this case the negro was actually present. We also understand the law to be, that the husband, *jure mariti,* has such a dominion over the vested legal interest of his wife, in a chattel, real or personal, of which a particular estate is outstanding, that he can sell such interest, so as to transfer it completely to the purchaser, and that the law can transfer it for his debts. We understand the effect of an assignment by the husband, of his wife's equitable interest in a chattel, in which she has not the right of immediate enjoyment, to be different, for such assignment will not prejudice her right, should he die before her, and before the period allotted for such enjoyment to take effect. *Hornsby v. Lee,* 2 Mad., 16; *Purden v. Jackson,* 1 Russel, 1; *Bonner v. Martin,* 3 Russel, 65. It is perfectly established in this state, that a vested remainder in a slave dependent on a life estate in another, is a legal interest. We are therefore of opinion that these interests of Mrs. M'Intosh and Mrs. Curtis might have been sold (136) under the execution against their husbands.

But we agree in opinion with the Judge, that these interests were not sold by the sheriff. The deed of the sheriff professes to transfer property, in execution of an authority confided to him by law, and is not to be construed with the same favour to the vendee, as the deed of an individual, disposing of things over which he claims uncontrolled dominion. Nothing can pass by the sheriff's deed, but that which he has levied upon, and which was known, at the time of sale, as the subject-matter thereof. *Sheppard v. Simpson,* 12 N. C., 237; *Southerland v. Cox,* 14 N. C., 394. Any relaxation of this rule would be highly mischievous, in preventing fair competition, and producing ruinous sacrifices. If there be any case, calling for the rigorous application of this rule, it is when reversionary interests—rights to future enjoyment—are disposed of by judicial sales. These are not the *usual* subjects of such sales. Their existence, nature, limitations, are not inquired into, unless attention be explicitly called to them. Without a distinct annunciation that such interests are exposed to sale, every one understands that the immediate ownership, limited

or absolute, is that for which a price is demanded. The sheriff's deed but authenticates the transaction, and shows that the transaction was a sale of property in possession. It recites the subject-matter of the sale to be negro Bob, "*the property* of Moses Knight," and this recital *qualifies* the subsequent part of the deed, as the annunciation at the sale, in the same words, would characterize the sale itself. It *may be*, that if the mistake had been in supposing the property to be in one defendant, when in truth, it was the property of another, inasmuch as there was no mistake in the thing sold, the property might pass, notwithstanding the mistake of title. But here one thing was sold and another claimed. The negro was sold as the property of him who had the negro in possession, and this without further explanation, means the immediate property in said negro; and the purchaser claims what was not sold, a right of future enjoyment, if the negro should outlast his living owner. The misfortune of
(137) the defendant is, not that he did not obtain what he purchased, the property of Moses Knight, but that, instead of Moses Knight being the absolute, he was only the limited owner of Bob. We think that the Judge was warranted in thus considering the sale, upon an examination of the bill of sale, independently of all extrinsic proofs. But take the bill of sale, in connection with the defendant's testimony, and the truth is undeniable. Nothing was then known of any reversionary interests in the negro Bob—nothing but Moses Knight's interest was set up for sale, and that was supposed to be an absolute interest, but proved to be an interest during the life of his wife only.

The other objections relied on in this case, are overruled for the reasons set forth in the case of *Knight and others v. Wall.*

PER CURIAM. Judgment affirmed.

Cited: Carter v. Spencer, 29 N. C., 18; *Hearn v. Kenan,* 37 N. C., 38; *Howell v. Howell,* 38 N. C., 527; *Weeks v. Weeks,* 40 N. C., 120; *Rea v. Rhodes, Id.* 157; *Blanton v. Morrow,* 42 N. C., 48; *Vann v. Hussey,* 46 N. C., 385; *Arrington v. Yarborough,* 54 N. C., 78; *Whitesides v. Williams,* 66 N. C., 144; *Wyche v. Wyche,* 85 N. C., 98.

JOHN A. KNIGHT, et al. *v.* WALTER LEAK, et al.

PER CURIAM: This cause presents no exceptions in addition to those which have been considered and overruled in the suit brought by the same plaintiffs against Stephen Wall, *ante* 125. The judgment must therefore be affirmed.

Badger for the defendants.
Devereux, for the plaintiffs.

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(138)

Den. ex dem. CHARLES W. SKINNER v. AUGUSTUS MOORE.

1. A judgment rendered on an original attachment cannot be avoided or reversed, or treated as a nullity by a mere stranger, for error or irregularity in the proceedings, upon which the judgment was rendered.

2. Under Sec. 65 of the act of 1777 (*Rev. ch. 115*,) the county in which an attachment should issue, returnable to the County Court, is the county from which the debtor has removed, or is removing himself privately; and if it be issued and returned to the County Court of any other county where the debtor may have property, it may be abated by plea for want of jurisdiction as to the person; but if no such plea be put in, and the creditor obtains a judgment for his debt, the same being within the jurisdiction of the County Courts, such judgment will be valid and conclusive.

3. By our attachment law, a judgment obtained upon a proceeding in an original attachment, is placed upon the same footing with a judgment rendered in a Court of Record, according to the course of the common law. It cannot be collaterally impeached by evidence or by plea, except by a plea denying the existence of the record, and is conclusive until it be set aside by the same court, or reversed upon a writ of error or on appeal by a superior tribunal.

4. Where it appears from the record that the property attached is not the property of the debtor, the judgment thereon is absolutely null and void; for an appearance, or a service of process on the person or property of the defendant, is essential to the validity of every judgment; but the fact that the property attached was not that of the defendant, cannot be shown by evidence *dehors* the record; and the interlocutory judgment condemning the property attached as the property of the defendant, is as much conclusive as any other judgment, until it be set aside or reversed.

5. An irregularity or defect in the affidavit upon which an attachment issued, if error at all, will not render the judgment void.

6. A judgment for a larger sum than that sworn to in the affidavit, is erroneous for the excess only.

7. A plaintiff in attachment who obtains a judgment, sues out execution thereon, and becomes the purchaser at the sheriff's sale, will not be affected by any irregularity in the suing out of the attachment, or any other proceeding prior to the judgment. The judgment is the act of the court, and is a sufficient authority for what is regularly, that is, according to the course of the court, done under it.

This was an action of ejectment brought to recover the possession of a house and lot in the town of Edenton, tried at Chowan, on the last Spring Circuit, before *Dick, J.*

(139) The lessor of the plaintiff, after showing that the premises described in his declaration, and then in the occupation of the defendant, had formerly belonged to one James R. Creecy, produced in evidence the copy of the record of a judgment, obtained against the said Creecy in the County Court of Perquimans county, in favour of himself. He then showed an execution issued on the said judgment, a sale by the sheriff, and a deed from the sheriff to himself as the purchaser.

From the record of the judgment it appeared that it was founded on an original attachment, issued by a justice of the peace of Perquimons county, on an affidavit of the plaintiff, stating "that James R. Creecy is justly indebted to him in the sum of two thousand two hundred and forty-eight dollars sixty cents, due by promissory note; that the said James R. Creecy hath so removed himself out of the county or so absconds or conceals himself, that the ordinary process of the law cannot be served on him." The attachment itself recited the oath as having been made "that the said James R. Creecy hath removed out of your county, or so absconds or conceals himself, that," &c. The sheriff returned the attachment with an endorsement that he had levied it "upon two hundred and twelve dollars with interest thereon from August 1827, in the hands of Josiah C. Skinner, due by a bond or note from said Josiah C. Skinner, to James R. Creecy, the defendant in this attachment, and I have summoned Josiah C. Skinner as garnishee, agreeable to act of assembly." Upon the return of the attachment to the County Court, the garnishee appeared and filed the following garnishment, to-wit: "Josiah C. Skinner garnisheed at the instance of Charles W. Skinner, against James R. Creecy, admits that he is indebted to James Creecy in the sum of two hundred and twelve dollars due by

bond or promissory note bearing date the ———— day of ————, 1827, due six months after date, and that the same has not been paid by him. This affiant denies that he has any other effects of the said James R. Creecy in his hands. He further denies that he knows of any one who has now, or at the time of suing out the plaintiff's attachment, had any of the effects of the said James R. Creecy. This affiant further states that the aforesaid bond or promissory note is payable to James T. Tredwell, and has (140) been paid over to James R. Creecy, but whether assigned or endorsed by the payee or obligee this affiant knows not. This affiant states that he mentioned the payment of the said note to James R. Creecy, about two days before Creecy left Edenton, and said Creecy had the said note or bond then in his possession, and promised this affiant that he would surrender up the said note or bond, to Charles W. Skinner, for the benefit of this affiant, but where the note or bond now is, or what the said Creecy afterwards did with the said bond or note, this affiant is ignorant." The evidence of the plaintiff's claim was a promissory note in these words, to-wit:

"Edenton 26 March, 1829.

"On the first day of July next, I promise to pay Chas. W. Skinner, Esq., or order, two thousand four hundred and ninety-eight and sixty cents, in full, for his crop of cotton, with interest from the date hereof.

(Signed) "J. R. CREECY.

"Jo. C. Skinner's note to be deducted."

At the return term of the attachment, judgment by default was rendered against Creecy, and an order made for publication in the Elizabeth City Star, or Edenton Gazette for two months, and the cause was then continued. At the succeeding term, it appearing that publication had been made according to law, the court condemned the property attached for the payment of the plaintiff's debt and rendered a judgment final against Creecy for the sum of two thousand four hundred and ninety-eight dollars, and also one against the garnishee, J. C. Skinner, for two hundred and twelve dollars with interest from August, 1827. And on the judgment against Creecy the execution issued on which the house and lot in

question was sold, when the plaintiff became the purchaser as above stated.

In the course of the trial it appeared that James R. Creecy, at the time of his leaving the state, was not an inhabitant of Perquimons county, but was then, and had been for (141) many years before, a resident of the town of Edenton, in the county of Chowan. It also appeared from the return made by the Sheriff of Chowan to the first execution which came to his hands on the aforesaid judgment against Creecy, that the house and lot in dispute had been conveyed by the said Creecy by a deed in trust for certain purposes.

For the defendant it was contended, that the proceedings on the original attachment, in the name of the lessor of the plaintiff, against Creecy, were irregular and void, and that the lessor of the plaintiff derived no title under his purchase and deed from the sheriff.

1st. Because the affidavit on which the attachment issued was too indefinite, inasmuch as it did not show whether Creecy had removed from the county, or whether he had absconded or concealed himself; and further that the affidavit stated that Creecy had removed himself out of the county, and to give the court jurisdiction, it should have stated that he had removed himself from the county.

2nd. That inasmuch as the judgment was for more than the amount sworn to in the affidavit, it was therefore irregular and void.

3rd. That the judgment was irregular and void, because judgment by default was rendered up, at the same term to which the attachment was returnable.

4th. That it appeared by the record that the note of Josiah C. Skinner, was entered as a credit on the note of Creecy to the plaintiff, and that it was therefore the property of the plaintiff, Charles W. Skinner, at the time the attachment issued, and consequently could not be attached as the property of Creecy, and made the foundation of proceedings against him; and that as no other property was attached, the court had no jurisdiction.

5th. That the judgment in Perquimons County Court did not authorise the levying a *fieri facias* on property not attached in Chowan county.

6th. That as the property levied on by the sheriff under

the first execution was covered by a deed in trust as appeared by the return of the sheriff, it was incumbent on the lessor of the plaintiff, to show that the trust had been satisfied or otherwise discharged, at the time the sheriff (142) levied his execution under which the sale was made.

7th. That as it appeared in evidence that James R. Creecy was a resident citizen of Chowan county, at the time he left the state, and had been so resident for several years, no attachment could issue against him or his property in Perquimons county, and that such attachment could not be made returnable to the County Court of Perquimons.

His Honor held, "that as Charles W. Skinner was the plaintiff in the attachment, and also the purchaser at the sheriff's sale, he was affected with notice of any irregularity in suing out the attachment, or any of the subsequent proceedings thereon. That that court had a right to look into the proceedings on the attachment to see if they had been according to law, when the plaintiff in the attachment and the purchaser at the sheriff's sale, were one and the same person." His Honor was of opinion also "that as Creecy was not an inhabitant of Perquimons county at the time he absconded, and for several years before, but had been a citizen of Chowan county for several years, and up to the time he absconded, it was irregular for the plaintiff to sue out his attachment in Perquimons county, returnable to Perquimons County Court, although Charles W. Skinner, the plaintiff, and Josiah C. Skinner, the garnishee, resided in the county of Perquimons at the time the attachment was sued out, and at the time J. C. Skiner was summoned as a garnishee; that the County Court of Perquimons had no jurisdiction of the case under all the circumstances; and the judgment on the attachment was therefore void." "For this and other defects appearing on the record, his Honor ordered a nonsuit to be entered;" and the lessor of the plaintiff appealed.

Badger, for the lessor of the plaintiff.
Iredell and *Devereux,* for the defendant.

RUFFIN, Chief Justice: The particular ground on which his Honor held the judgment in the suit by attachment to be void and that the lessor of the plaintiff derived no title by his

purchase at the execution sale, is, that Creecy, as shown by evidence, had not lived in Perquimons, but was a resi-
(143) dent of Chowan for several years before and up to the time at which he absconded; and that the plaintiff in that suit stands affected by every irregularity in the process, and the subsequent proceedings thereon. The record, however, states other exceptions taken by the defendant to the validity of that judgment, and his counsel here have relied on several of them, and urged as a general proposition, that attachments are not known to the common law, and are in derogation of the common right of every person who is to be affected by judicial proceedings, to have personal notice, and the opportunity of making a full defence; and therefore, that a proceeding by attachment is not valid to any purpose, unless the directions of the statutes be in all respects observed.

The court is not insensible to the injustice that may be done, and, we believe, is frequently done here and in other states, and especially to non-residents, in suits commenced by this process; by which the seizure of a trifling article founds a case for the recovery of a large demand; but we think, that we are now obliged to hold, that such judgments rendered in this state have the same operation and effect here, as those rendered by the same courts in other actions have.

The whole argument on the part of the defendant has been met *in limine* by an objection from the other side, that if the judgment be void, it can be avoided only by the defendant therein; and that it cannot be deemed so entirely null, that the present defendant, without showing any connexion between him and Creecy, can allege it. This position is not without force, nor entirely destitute of authority. If Creecy, knowing the debt to be just, submits to the sale of his property under it, a mere wrong-doer, one having no colour of right, ought not to gain the possession, and defy the purchaser. If it be not so absolutely nugatory, that Skinner can treat his judgment as null, and, saying that his original cause of action is not merged in it, brings a new action thereon, it would seem that third persons ought not to set the judgment at nought.

We know that in England the slightest steps are fatal
(144) to outlawries, and they are reversed upon objections in which there is neither sense nor reason, as Mr. Justice *Buller* said in *Rex v. Almon*, 5 Term, 202. Indeed, those

on mesne civil process are set aside of course upon the party's appearing and putting in bail, as in our attachments—both being designed to compel an appearance. Yet in *Symonds v. Parminter,* 1 W. Blk., 20, where process was sued against two on a joint contract, and one of them was prosecuted to outlawry, and the plaintiff declared against the other alone, the latter was not allowed to plead the illegality of the outlawry, and insist thereon that the plaintiff could not come against him alone: for, said Lee, Chief Justice, it is not void, but voidable at the instance of the party himself, and a stranger shall not demand of the court to pronounce the outlawry null.

But, as upon another trial the defendant might show some interest in himself, and in that event this point would not be decisive of the rights of the parties, the court has considered the others made in the argument.

The general rule has not been questioned by the defendant's counsel, that the judgment of a court having jurisdiction of the subject-matter, and proceeding, according to the course of the common law, by declaration, plea, issue, trial by jury and judgment of record, cannot be collaterally impeached, but until it be set aside by the same court, or reversed in a superior tribunal, is conclusive. Such is, unquestionably, the general rule of law. The reason is, that the judgment itself is evidence of the right determined in it, or debt recovered; and is evidence so high, that the denial of the right can only be made in the form of a plea denying the existence of the record alleged. The principle applies to all courts to which a writ of error runs from a higher Court, or from which an appeal lies to a higher court, which itself proceeds according to the common law; because these are adequate remedies for any error. As to inferior tribunals, or those having a special and peculiar jurisdiction, it is otherwise. Their improper acts may in some instances, be restrained in their progress, by prohibitory writs from the court of general superintending powers; or in others, may be cor- (145) rected by having their proceedings brought up by *certiorari* and quashed; and, in yet others, may be questioned by plea. But we are not aware of any instance in which the subject-matter is within the jurisdiction, and a cause is once constituted in a court of record, that the judgment is not con-

clusive between the parties, or any other plea is admissible, except *nul tiel record;* and that without regard to the process by which the action was commenced.

The judgment here is for a certain sum of money; and to raise the same the premises in dispute were sold under execution. Had the court power to pronounce such a judgment in any case; and had it jurisdiction of the cause of action in this case? It is insisted, that the County Court of Perquimons had not jurisdiction, because Creecy had not resided there, and the authority to a justice of the peace to issue an attachment is restricted to one against the estate of a person absconding from his own county. By sec. 25 and 27 of the act of 1777, (*Rev. c.* 115) provision is made relative to attachments in the Superior Courts. Any justice of the peace is authorized to issue them, as well as a judge of the Superior Court, returnable to the court where the suit is cognizable; which must mean such of the courts as would, according to other parts of the act, have jurisdiction over the persons, if the process had been personally served—in which last case, the defendant has a plea in abatement, if neither he nor the plaintiff live in the district. The 65th section is that which provides for suits by attachments to the County Court; and it authorizes every justice of the peace of the County Courts, upon complaint made for *any debt or damage cognizable in the County Courts of Pleas and Quarter Sessions in this state,* to grant an attachment against the estate of any person removing out of the county privately, returnable to the court of such county, observing the rules appointed for those returnable to the Superior Courts. We agree in the observation of *Chief Justice Taylor,* in the *Bank v. Hinton,*

12 N. C., 397, that there is no law in the statute book
(146) which more imperiously demands a strict construction, than the attachment law; and very trivial objections to the process and to the jurisdiction, as to the persons, and the like, are to be listened to, if brought forward at the proper time. We also entertain no doubt, that the court of *"such* county," to which the writ is to be made returnable, according to sec. 65, is *"the* county" of the justice, and *"the* county" out of which the debtor has removed or is removing privately; and if the case rested at the process and the question concerned its regularity, it

would, we think, be against the plaintiff; but it does not. The question now concerns the effect of the judgment for the debt—that "debt being cognizable in the County Courts of this state." As we conceive, the jurisdiction of suits by attachment is not specially delegated to a particular court in a particular case, and in that only; but that process is given instead of the *capias* to all courts to enable them to exercise their jurisdiction over the subjects-matter generally which are within their jurisdiction. The subject of this suit is a debt, and is within the jurisdiction of the County Courts. By the acts of 1777, (*Rev. c.* 115, s. 56); and 1785, (*Rev. c.* 233) the County Courts are made courts of record, with general jurisdiction to try and determine actions of debt and all causes whatsoever at the common law, with certain specified exceptions. The jurisdiction is not limited to causes of action, arising in the county. But they cannot issue original process, running out of their own county, though subpœnas and final process from them may run into any part of the state. The restriction upon their process seems necessarily to limit their jurisdiction to cases in which the original process is served in their county; but that seems to be the only restriction upon their jurisdiction. As to the subject-matter, it is as extensive as it can be. When, therefore, the person or the thing, which it is necessary to have before the court in order to constitute a cause in court, is found and taken within the county, the cause is then constituted; and if the matter be within the cognizance of the court, the judgment rendered thereon is entitled to the faith and credit of record evidence. Its efficacy cannot be impugned by the allegation that another court had concurrent jurisdiction (147) of the subject-matter, and that the defendant had a right to have the cause tried in such other court. That is not an objection of the total want of jurisdiction; which every court must take notice of, because that renders any adjudication null; but it is an objection to the exercise of the jurisdiction between the particular parties, upon the ground of a provision in the law for their convenience, and is therefore to be brought to the notice of the court by putting the fact on the record by plea. The distinction is between the entire want of jurisdiction, which no consent of the parties can confer, and a general jurisdiction, except in particular cases, or

between particular persons, in which the exception must appear upon objection made. A familiar example is furnished in the clauses of the act of 1777, which prescribe in what Superior Court suits shall be brought; but if brought otherwise, advantage can only be taken by plea in abatement. So, in the case before us—all County Courts have, by one general provision, jurisdiction of debts at common law. That is not cut down to a special jurisdiction by another particular provision giving jurisdiction of debts in a certain case to a particular court; for in each court the trial is in the same mode, the right determined upon the same rule as to the law, and as to the nature and extent of the proof. Such a provision is therefore merely for the ease of the party; and consequently must be availed of either in the progress of the cause, or perhaps, in some cases, by way of reversal, and not by averment of the excess of jurisdiction. In the particular case before us, although the affidavit does not, the attachment itself purports to state that Creecy had absconded from Perquimons county; and it would be exceedingly difficult to find a ground upon which the record can be contradicted as to *that fact* by evidence *in pais*. But the other is a sufficient answer, namely, that the cause of action was within the jurisdiction of the court, and there was no objection from the defendant.

(148) It is said, however, that in this respect attachments differ from other suits; because the defendant is not served with process, and may not appear, and when he does not appear, cannot be considered as waiving any thing. The argument may be properly urged for reversing a judgment in attachment for errors the party is deemed to have waived by appearing, and pleading in bar, or to be cured by having a verdict found against him. It is also forcible against the policy of giving efficacy to an adjudication rendered in the party's absence, and without notice; or at all events, beyond the condemnation of the thing attached. The mischief is in giving full effect to such a judgment, how regular soever may have been the observance of the rules for prosecuting the suit, rather than in allowing it when some of those rules, as to the manner of proceeding, may have been overlooked. But if the legislature thinks it proper to enact that such a judgment shall have the operation of judgments in

actions commenced by original process personally served, the statute is to be quarreled with, but not the court for giving credence to the record. Such, we think, is our statute law. The judgment is not *in rem,* but personal. The act goes on the idea that seizing property and advertisement would give notice, and therefore they are made to constitute notice. Consequently, if the party will not or does not appear, it is treated as his default; and judgment is entered against him personally.

By sec. 23 of the court law, judicial attachments in the Superior Courts are given; and it is provided that the goods attached, unless replevied, shall remain in the custody of the sheriff until *final judgment,* and then be disposed of in the same manner as goods taken in execution on a writ of *fieri facias;* and that if *the judgment* be not satisfied by the sale of the goods attached, *the plaintiff may have execution for the residue.* The 25th section gives original attachments in the same courts, and the *same proceedings are directed to be had thereon* as on judicial attachments. Among the rules prescribed for the County Courts by sec. 73, the declaration is to be served on the defendant or his attorney five days before court, and filed on the first day of the term, or at the calling of the cause. The service of it is dispensed with in sec. 71 in judicial attachments, thereby given in the (149) County Courts "to enforce appearance," and it is provided, that if the sheriff shall return the writ executed, *the plaintiff shall file his declaration according to the rules of the court, and proceed as in other cases.* By sec. 65 original attachments are likewise given in the County Courts for any debt, or damage cognizable therein, and *the like judgment, remedy, relief and proceedings shall be had thereupon, as in like cases are grantable in the Superior Court.* This language is explicit, that he who sues by attachment is to declare for his debt as at common law, and to recover a judgment, not against the thing, but against the defendant, also as at common law. Accordingly it has been held, that the plaintiff is not restricted to a judgment of condemnation and a *venditioni exponas,* but may issue a *fieri facias* against the estate generally of the defendant. *Amyett v. Backhouse,* 7 N. C., 63; *English v. Reynolds,* 4 N. C., 529, was an action of debt for a balance due on such a judgment after a sale of the property

attached, and the question was made, whether the record was evidence, and if so, whether it was *prima facie* or conclusive; and the court held it to be conclusive; in other words, that *nul tiel record* was the only plea. In the cases, yet nearer to the passing of the act, of *Haughton v. Allen*, 1 N. C., 364; and *Bickerstaff v. Dellinger*, *Ibid.* 474, it was laid down, that our attachments were not like those founded on the local custom of London, but were governed by our own statutes as general laws, and that the judgments in them were to be reviewed by writ of error, as the judgments of courts proceeding according to the course of the common law. More recently, in *Swaim v. Fentress*, 15 N. C., 601, upon a *certiorari* the Superior Court had superseded the judgment of the County Court in an attachment as being void for certain errors and irregularities; but this court reversed the decision, upon the ground, amongst others, that the record could only be brought up to be examined upon the matter of law by writ of error, and that it could not be quashed. We then thought that we were obliged to look at the judgment, as that of a court of record, proceeding according to the course of
(150) the common law. In fine, to impeach it, by plea or evidence, when the defendant has either appeared, or when the cause has been constituted in court, as contemplated in the act, by a seizure of property and notice, instead of a *capias* or personal summons, could be allowed only upon the ground, that the legislature have not the power of dispensing with the personal service of process, and that the act is unconstitutional; a position not taken at the bar, and in view of the statute books of the American states, it cannot be supposed that it will be taken.

It has been further insisted, that the judgment is a nullity, because the attachment was not served on the property of Creecy. If such be the fact, and it can be seen on the record, the Court has no hesitation in expressing an assent to the conclusion. It is of the substance of the justice due to a defendant, that he should have notice of the action. So much is held out to him in this statute. But a *distringas* cannot give the notice, unless a distress be made; and therefore it is essential, in whatever court the suit be brought, whether it be one of universal, as well as one of the most limited jurisdiction; for the question is not, whether there be a

judge, but whether there are allegations between these parties, on which there can be an adjudication. A record is not evidence, except of its own existence, between any persons but those who are parties to the proceeding stated in it, or their privies. If the proceeding be not *in rem*, and there be no parties, there can be no adjudication; and it can appear that persons were made parties, only when the record states their appearance in court, or the official service of the process of the court. This seems to be a first principle, not needing the support of an authority, but it is stated in *Pearson v. Nesbit*, 12 N. C., 315; *Armstrong v. Harshaw, Ibid.*, 187, and *White v. Albertson*, 14 N. C., 341. As applied to attachments, it renders indispensable a distress of the debtor's property, in order to constitute the cause in court; and unless that appear of record, the proceeding is *ex parte*, and not binding on the debtor. In *Amyett v. Backhouse*, 7 N. C., 63, it is said, that the only effect of issuing the attachment, and having it levied, is to give the court jurisdiction, whereby judgment may be obtained. There is, perhaps, an inaccuracy in (151) the use of the term jurisdiction, for the defect is, that the court has no person or cause before it. But the inaccuracy is no wise material to the present inquiry. In *Haughton v. Allen*, 1 N. C., 364, it was held that a garnishee was entitled to a writ of error on the judgment against him, although the effect might be to reverse, or reduce to a nullity the judgment against the defendant in the attachment; and it was further held, that such would be the consequence, if the attachment was served only in the hands of the garnishee. The two judgments were considered as so connected, that one could not exist without the other; for unless the plaintiff find property in the hands of the garnishee, he cannot have judgment against the defendant; and if the judgment against the garnishee be reversed, there is nothing then to support the principal judgment, which must fall of course, each part being essentially necessary to the other. In *Armstrong v. Harshaw, supra*, several attachments were served on a parcel of corn, supposed to belong to Harshaw; and upon a sale of it, by order of the court, it did not produce enough money to satisfy the prior attachments, and there was nothing left, applicable to the plaintiff's demand; yet the plaintiff proceeded afterwards in his suit, and took judg-

ment, and then brought an action of debt on it in this state. It was adjudged against the plaintiff upon *nul tiel record,* upon the ground that there could be no judgment *against the defendant,* as *he* was not a party to the proceeding. Indeed, it is probable that the proviso to the thirtieth section of the act, which forbids judicial process, (including, of course, final process, as well as that issued pending the suit) to be issued, unless grounded on an original attachment, or unless the leading process be executed on the defendant when in the state, has this point in its purview. It is clearly intended that there should be service of the writ, on the person or the property; and therefore we think the judgment null, unless the record shows service, either of the one kind or the other, or an appearance.

We are, however, further of opinion, that evidence *dehors* the record, is inadmissible to establish, as a fact, that (152) the estate attached was not the property of the defendant. Such evidence is not relevant to the only issue that can be joined in an action on the judgment, namely, *nul tiel record.* If addressed to the jury, it would contradict the record, when that shows that the court had found and condemned the thing, as the property of the defendant; which interlocutory judgment is as much between the parties, and as conclusive, while it stands, as that finally rendered for the debt. The service on the property, as stated in the record, stands on the same ground as appearance or personal service of process, therein appearing, against which no averment can be made collaterally. A mistake of the court in either respect, is error of judgment, as to the fact or the law; and like other errors of a like kind, it must be investigated and corrected, directly, and not incidentally. If the record show that there was a distress of a particular thing, and that it was not the property of the defendant, or was legally applied to satisfy other persons, so that no part thereof could be, or was condemned to the use of the plaintiff, or that the garnishee declared that he had no estate of the defendant, and was not indebted to him, and yet the court thereupon should give a judgment against the defendant, it would be void, because there was nothing before the court on which it could act. It has been contended that such is the case before us. The garnishee declared, at August Term, 1829, that he was in-

debted to Creecy in the sum of two hundred and twelve dollars; and at the next term, the court condemned that sum to answer the plaintiff's recovery. In a subsequent part of the garnishment, it is stated, that the debt was due by bond or note, not payable to Creecy, but to another person, and it is expressly left uncertain whether it had been endorsed to him or not, and whether or not it had been endorsed by him; though it appears that he was the holder of the note, and claimed it, and had promised to pass it to the plaintiff, in part of his debt. Upon this state of facts, several objections have been taken by the defendant.

It is first said, that supposing the note to have been assigned to Creecy, it is a negotiable instrument, and for that reason, the debt is not the subject of attachment, and (153) therefore Creecy was not in court. Attachments, upon their face, run against "the estate" of the defendant; but the twentieth section of the act provides, that they may be served in the hands of a person supposed to be *"indebted"* to the defendant, and that such person shall declare on oath, what he or any other person, to his knowledge, is indebted; and this, by the act of 1794, (*Rev. c.* 424) is extended to debts payable at a future day; and the court, upon the appearance and examination of the garnishee, is required to enter up judgment, and award execution against him, "for *all sums of money* due to the defendant from him." These terms embrace every debt, whether due by bond or otherwise; and in practice, those due upon negotiable securities have been attached as well as others. If the instrument was assigned before process of attachment sued, and the garnishee, in ignorance of it, confess the debt in his garnishment, what is to be the effect as between the garnishee and the assignee, has not, we believe, been as yet decided; nor, in case the assignee's right is to be preferred, whether the garnishee and the defendant, or either of them, may not, by some legal proceeding, and what, put the fact of the previous assignment on the record, so as to protect the garnishee from a double payment, and reverse the judgment against the defendant, by reason that none of his effects, were, in truth, distrained. We give no opinion upon those questions, because they do not concern the present case. Here no assignment by Creecy appears in the record; and if the note had been endorsed to him, the debt,

legally as well as equitably, belonged to him, and was therefore the subject of attachment.

It is next said, that no endorsement to Creecy appears, and therefore he could have no *legal* interest, which alone is liable to attachment. It might, perhaps, be a sufficient answer to this, to say, that every thing consistent with the express declarations in other parts of the garnishment, is to be presumed, to support the judgment, on the distinct acknowledgement in the beginning of it, of a debt from the garnishee to Creecy; and therefore, although the note may not have (154) been endorsed, that the garnishee had expressly promised Creecy to pay him, as the holder and equitable owner of the note—especially as it appears, that the note, and the payment of it, had been the subject of arrangement between them. But a clear answer to it, as an objection in this cause, consists, as we suppose, in the judgment of condemnation in the record; which operates like other judgments, until it shall be reversed at the instance of Creecy, or the garnishee.

The same is likewise true of the other objection, that the debt attached was entered as a credit on the note sued on. It has this memorandum at the foot of it, "Jo. C. Skinner's note to be deducted;" and the garnishee deposed that Creecy promised him that he would pass his note to the plaintiff. The court nevertheless condemned the debt as the property of Creecy; and that judgment remains in full force—which compels us to regard it in like manner. We may, however, observe upon this part of the case, that nothing appears that induces us to think the judgment erroneous. The memorandum does not identify the debt, and is not in the nature of a credit or entry of payment which would have specified the sum. It is rather evidence of an executory agreement or understanding, that the creditor should or would take J. C. S's. note in part payment.

Having thus disposed of the principal objections, it seems scarcely necessary to go through the others particularly. The third, fifth, and sixth exceptions were given up, as not amounting to error or irregularity. The defects in the affidavit could at most, be error only; and perhaps not that, since the total want of the affidavit is matter of abatement by the 26th section of the act. That the judgment is for a larger sum than the debt sworn to, and mentioned in the attachment,

is error for the excess only. *Dowd v. Seawell,* 14 N. C., 185.

But it has been further contended, and of that opinion was his Honor, that, although a stranger purchasing at the sale might not be, yet the plaintiff in attachment is affected by any irregularity in suing out the writ, or in any of the subsequent proceedings; and that the court may look into them to see if they have been according to law. We (155) think this is a misapplication of a doctrine which is sound in itself, when properly understood. It is true that the party is responsible for suing out *irregular process,* whether mesne or final; that being the act of the party himself. If a plaintiff sue out a *capias ad respondendum* not returnable to the next succeeding term, it is irregular and void, because the defendant may thereupon be imprisoned a long time before he can make his defence. In such a case, trespass will lie. *Parsons v. Loyd,* 3 Wils., 341. But it does not follow that a judgment for the demand claimed in the writ is also void, and that the plaintiff could not purchase at a sale made by the sheriff under it. The contrary is the law. The judgment is the act of the court and not of the party; and is a sufficient authority for what is regularly—that is, according to the course of the court—done under it. It may be, that here Creecy was entitled to his action against the plaintiff, and also against the justice of the peace, for issuing the writ and attaching his property in a county in which he had never lived, and that for the same reason, the judgment of the court is erroneous. Yet it cannot be deemed void, unless every erroneous judgment is to be thus treated. So too, the plaintiff is liable to the action of the defendant for suing out an execution not warranted by the judgment; as a *ca. sa.* on a judgment against an executor *de bonis testatoris. Baker v. Braham,* 3 Wils., 368. Or a *fi. fa.* for a larger sum than that for which the judgment was rendered. *Coltraine v. M'Cain,* 14 N. C., 308. And if execution issue after a year and a day, the plaintiff cannot acquire a title, though a stranger may, and the sheriff be justified. *Oxley v. Mizle,* 7 N. C., 250; *Weaver v. Cryer,* 12 N. C., 337. But here is no irregularity in the execution. The judgment warranted it, if the judgment itself was not void. Now, it is likewise true that an irregular judgment does not justify the plaintiff in any of the acts done under it, provided it be set aside, although it does the

officer; and a stranger gets a good title even if it be set aside. *Turner v. Felgate,* 1 Lev., 95; *Barker v. Norwood,* (156) 3 Wils., 376. It is the same as to the party, when set aside as if it had never been. *Phillips v. Biron,* 1 Str., 509; *Bender v. Askew,* 14 N. C., 149. But it remains to be ascertained, what is an irregular judgment, in the sense we are speaking of. It is not irregular, because it is erroneous. Error does not constitute irregularity; nor does it necessarily enter into it: an *irregular judgment,* is one entered contrary to the course, the practice of the court; as out of term time; by default, before the proper period of the term; or without service of the process; upon a forged or extorted warrant of attorney; or the like. If it appear upon the record entirely free from error, yet the court by which it purports to have been pronounced, may set it aside for the *irregularity;* but no other court can, unless in an appellate capacity. *Bender v. Askew, Reed v. Kelly,* 12 N. C., 313, and the cases there cited. This doctrine has therefore no application to this case, unless judgments in attachments are of a different nature, or stand upon a different ground from those in other suits. We have already shown, that when the suit is well constituted by distraining property or summoning a garnishee, the judgment is, in our law, precisely the same as if the process had been personally served. It may be reversed for errors which would not have been sufficient if the party had appeared, or perhaps, if the process had been served on the person. But as the judgment is the same in each case, that in attachment, until it be reversed, has the same operation the other has. It can be questioned at law only by writ of error; and other relief can be had only by invoking the aid of that tribunal in which unjust judgments obtained by surprise and without the opportunity of defence at law are relieved against.

The judgment of the Superior Court must be reversed, and the parties go to trial before another jury.

PER CURIAM. Judgment reversed.

Cited: Winslow v. Anderson, 20 N. C., 4; *Burke v. Elliott,* 26 N. C., 358; *Hooks v. Moses,* 30 N. C., 90; *Respass v. Pender,* 44 N. C., 79; *Harrison v. Simmons, Id.,* 81; *McLane v. Moore,* 51 N. C., 524; *Cheshire v. McCoy,* 52 N. C.,

378; *Bank v. Spurling, Id.*, 403; *Israel v. Ivey*, 61 N. C., 553; *Dick v. McLaurin*, 63 N. C., 186; *Grier v. Rhyne*, 67 N. C., 340; *Woody v. Jordan*, 69 N. C., 199; *Turner v. Duglass*, 72 N. C., 134; *Lee v. Bishop*, 89 N. C., 260; *Penniman v. Daniel*, 91 N. C., 435; *Sumner v. Sessoms*, 94 N. C., 377; *Hinton v. Roach*, 95 N. C., 111; *Brittain v. Mull*, 99 N. C., 491.

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JOHN SIKES, et al. v. LEMUEL BASNIGHT.

1. A person claiming title under one who is estopped, will also be bound by the estoppel.

2. He who claims title to land by estoppel, is, as to those estopped, in the constructive possession of the land; and in an action of trespass, no one who is bound by the estoppel can prove a superior title in a stranger, unless the court be satisfied that such trespasser at the time he entered, did not claim title under the deed by which he is estopped; in which case, the evidence would be admissible to show that he was accountable in damages to the stranger who had the better title, and not to the plaintiff.

The case of *Phelps v. Blount*, 13 N. C. 177, approved.

This was an action of *trespass quare clausum fregit*, to which the defendant entered the pleas of "general issue; *liberum tenementum;* and statute of limitations." Upon the trial at Tyrrell, on the last Spring Circuit before *Dick, J.*, the plaintiffs deduced title by a regular chain of conveyances, from one Daniel Sawyer to themselves; and then exhibited a deed from the said Daniel Sawyer to the defendant, for the land on which the trespass was committed, of a younger date than the deed under which they claimed. Neither party appeared to have been in actual possession farther than by getting shingles on the land, which was a juniper swamp. The defendant then offered in evidence a grant from the state to one Belangee, of older date than either the deed from Sawyer to the plaintiffs, or that to himself; but showed no title out of Belangee. The plaintiffs objected to the introduction of this grant; alleging that the defendant was estopped to deny the title of Sawyer, under whom both parties were claiming; and contending that he should not, in this action, be allowed

to show title in another person, and out of them both. His Honor overruled the objection; and the plaintiffs submitted to a judgment of nonsuit and appealed.

Heath, for the plaintiffs.
Iredell, for the defendant.

DANIEL, Judge: *Phelps v. Blount,* 13 N. C., 177, was a case like the one now before the court. It was an (158) action of trespass *quare clausum fregit.* The court then decided that one claiming title under a party who is estopped to deny the title of the plaintiff, is also bound by that estoppel. And that he who claims a title by estoppel, is, as to those estopped, in the constructive possession of the land, and may maintain trespass. Daniel Sawyer was estopped by his deed, to deny the right of the plaintiff. The plaintiff, to estop the defendant from introducing in evidence the patent to Belangee, showed forth a deed from Daniel Sawyer to the defendant, for the lands trespassed on, of a younger date than the one to himself. The plaintiff contended, that as he and the defendant *both* claimed the lands under Sawyer, the defendant could not in law be permitted to introduce evidence of a title in a third person. The judge overruled the objection, and permitted the defendant to give in evidence the patent to Belangee, which was older than the deed from Sawyer to the plaintiff. The defendant did not pretend to deduce any title from Belangee to himself. We are of opinion, that if the trespass alleged were committed upon a claim of title to the lands under the deed to him from Sawyer, he, according to the decision above mentioned, was estopped to introduce in evidence the patent to Belangee. If the court should be satisfied of the fact, that the defendant did not claim title under the deed from Sawyer to him, when he entered as such trespasser, then the evidence would be admissible, to show that he was accountable in damages to Belangee, who had the better title, and not to the plaintiff.

The nonsuit must be set aside, and a new trial granted.

PER CURIAM. Judgment reversed.

Cited: Wharton v. Moore, 84 N. C., 484; *Bonds v. Smith,* 106 N. C., 563.

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THE STATE v. WILLIAM T. TISDALE.

Where a bill of indictment for an assault and battery was found in the Superior Court against a person who was subsequently, but before being taken to answer the charge in the Superior Court, indicted and convicted in the County Court for the same offence, *it was Held*, that the County Court had jurisdiction of the case, notwithstanding the bill found in the Superior Court; and that to that bill he might plead his former conviction in the County Court.

The defendant was indicted in the Superior Court of the county of Nash, for an assault and battery, upon one Cullen Floyd; and at the last term of the said court, in September, he plead a "former conviction for the same offence, in the County Court of Nash, at its August Term, 1836;" to which the Attorney-General, for the state, replied, that before the prosecution commenced in the County Court, to wit, at the Spring Term, 1836, of the Superior Court, the present bill was found against the defendant, and that the prosecution had been since regularly kept up. To this replication the defendant rejoined, that he had no legal notice of the prosecution in the Superior Court, before his conviction in the County Court; and to this rejoinder the Attorney-General demurred. His Honor *Judge Strange* overruled the demurrer, and ordered the defendant to be discharged; whereupon the Attorney-General appealed.

The Attorney-General, for the state, contended,—That by the finding of the bill, the jurisdiction of the Superior Court attached to the case, and that the County Court then had none. By the act of 1777, (*Rev. c.* 115), the County Court had sole jurisdiction of the offence; and by the act of 1807, (*Rev. c.* 712), concurrent jurisdiction was given to the Superior Court; but the legislature could not have intended that two indictments for the same offence should be carried on at the same time. *State v. Yarborough*, 8 N. C., 78, decides, that where the jurisdiction of the County Court attaches, the Superior Court cannot act upon the case, except (160) upon an appeal. See also, *State v. M'Niel,* 10 N. C., 183. Hence, when the bill was found, the jurisdiction of the Superior Court attached, and the County Court could not afterwards entertain the case.

No counsel appeared for the defendant.

RUFFIN, Chief Justice: It is not denied, on the part of the state, that a former conviction is generally a bar to another indictment for the same offence. But it is said, that it is not a bar, unless the court which gave the judgment had jurisdiction; and that in this case, the County Court had none, because it attached, upon the finding of the bill, in the Superior Court, and necessarily ousted that of the former court.

We do not accede to that inference: the finding of a bill does not confine the state to that single bill. Another may be preferred, and the party put to a trial on it, notwiststanding the first remains undetermined; for *auter foits arraign* is no plea, generally. Thus it undoubtedly is, when both bills are in the same court: a second bill therefore is not taken *coram non judice* so as to be a nullity; but the jurisdiction of the offence remains, independent of that to be exercised on the first bill. Then, how is this affected by the two bills being found in two courts having concurrent jurisdiction? We think, that as respects the jurisdiction *of the offence,* the case is the same as if both prosecutions were in the same court. If, for instance, a bill were now to be found in the Superior Court—which might be, notwithstanding the former bill in that court—the defendant could plead to it his former conviction in the County Court, notwithstanding it took place hanging such first bill, on which no proceedings had been taken. The State may prefer a prosecution in any of her courts, which have jurisdiction, and may, in general, try the party on which she pleases. If two indictments be found in the same court, the course is to quash one before the party is put to plead on the other. If in different courts, neither court can be said to be ousted of its jurisdiction *of the offence;* though the defendant may have it in his power to abate (161) the latter bill by plea, that another court has cognizance *of the case* by a prior bill. It is like the case of a second civil action brought, pending a former; which is not matter of abatement of the first, but is a good plea of that kind in the second. Yet if it be not pleaded in abatement, and a judgment be taken in the second suit, there can be no doubt that such judgment might be pleaded, since the last continuance, in bar of the further prosecution of the

action first brought. This is not therefore a case of a total want of jurisdiction, but of a privilege to the defendant to object to being tried on a second indictment, either in the same or another court, until the first be disposed of; and like other privileges, it may be waived. This, we think, is the principle on which alone the judgment in *State v. Yarborough,* 8 N. C., 78, can be sustained; for the other ground, that the jurisdiction attaching in one court by the finding of the bill destroys the concurrent jurisdiction of another court, would go to this extent, that there could not be a trial on the second bill, although a *nolle prosequi* were entered on that first found in the other court; which is against the subsequent case of *State v. M'Neill,* 10 N. C., 183. That the court confined themselves in Yarborough's Case to a plea in abatement of the pendency of another bill, and felt the difficulty that would be presented by a plea in bar of a conviction or acquittal upon one of the indictments, is plainly to be collected from the observation "that while the indictment" (that is, the one fraudulently preferred) "is pending, and before judgment," the defendant's plea in abatement to the other indictment may be obviated by replying the fraud. No method of getting clear of a judgment in either is even suggested. If there be one, it must be of the same nature with the answer to a plea of another prosecution pending. Whether that would be sufficient, it is not for us now to say, since fraud is not alleged in these pleadings. If there can be a fraud, in a legal sense, in prosecuting and convicting an offender in a court on which the jurisdiction is conferred by law, as a competent and fit tribunal to try and punish criminals, it is certainly not to be presumed, without an averment of it in the record, (162) upon the single fact, that a bill had been previously found for the same matter in another court.

In the particular case before us, the defendant had no day in the Superior Court; he having neither been arraigned, nor even arrested on the bill in that court. Until he had a day in court on that indictment, he was not *vexatus* thereby, and stood in relation thereto on the same footing as if he had been put without day by a *nolle prosequi* thereon; in which last case it is laid down in *M'Neill's Case,* that he would be amenable on another indictment in *any court* having jurisdiction of the offence.

We are therefore of opinion, that there is no error in the judgment of the Superior Court.

PER CURIAM. Judgment affirmed.

Cited: *State v. Casey,* 44 N. C., 210; *State v. Johnston,* 50 N. C., 223; *State v. Hailey,* 51 N. C., 43; *State v. Swepson,* 79 N. C., 640; *State v. Williford,* 91 N. C., 530; *State v. Bowers,* 94 N. C., 913; *State v. Roberts,* 98 N. C., 758.

THE STATE v. EPHRAIM.

1. A jury charged in a case of capital felony, cannot be discharged before rendering a verdict at the discretion of the court, without the prisoner's consent; nor can they, in such case, be discharged, but for evident, urgent, overruling necessity, arising from some matter occurring during the trial, which was beyond human foresight and control; and generally such necessity must be set forth in the record.

2. Everything which is stated in a record as a *fact,* is to be taken as such, because the law reposes entire confidence in the integrity of the court; but where the record only states the evidence, without any judgment of the court ascertaining the fact sought to be established by it, no other court can draw the inference of fact from such evidence, and act upon it as a fact.

The case of the *State v. Spier,* 12 N. C., 491, recognized and sustained as authority.

This was an application for the discharge of the prisoner, a slave from confinement in the jail of Craven county. In the last vacation, his Honor, *Judge Gaston,* was applied to for a writ of *habeas corpus,* which he issued, and, on account of the graveness of the question likely to arise, made returnable before the judges of the Supreme Court. The sheriff of Craven returned with the writ, as the cause of the prisoner's capture and detention, that the prisoner was com-
(163) mitted to his custody by the Superior Court for his county, charged with the murder of Benjamin Venters, as by a transcript of the record of that court annexed to the return as a part of it, was set forth. By the transcript it appeared, that at the last term of Craven Superior Court, before his Honor *Judge Donnell,* an indictment was found against the prisoner for the murder of Benjamin Venters, upon which the prisoner was arraigned, pleaded not guilty,

and was thereupon put upon his trial by a jury: that on Sunday morning following the commencement of the term, the jury came into court, and declared that they had not agreed of their verdict, and that they were not likely to agree, however long they were kept together. Two of the jurors then stated that they were unwell; and being sworn, one of them deposed, that since he had been impannelled, he had taken a cold which had produced a violent sore throat, and he believed a longer confinement would seriously affect his health: and the other deposed, that since he had been impannelled, he had been attacked with rheumatism, to which he was subject by exposure, and considered a further exposure likely to be very injurious to his health: upon this the court proposed to discharge the jury, and asked the consent of the prisoner's master and counsel, which was refused: "whereupon" the record proceeded to state, "the court in the exercise of its discretion, believing this to be a case for the discharge of the jury, ordered a juror to be withdrawn, and the jury to be discharged; and the court hoping that on a proper case being presented, the Supreme Court would be disposed to review the doctrine laid down in the case of *Spier,* and believing that upon such review, it would be found that the principle of that case is neither supported by the weight of authority, or consistent with the enlightened spirit of the age—ordered the prisoner to be remanded to the jail of the said county, to await his trial at the next term of the court, before another jury.

J. H. Bryan, for the prisoner.
The Attorney General for the State.

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RUFFIN, Chief Justice, having stated the case as above, proceeded: The right of the prisoner to his discharge on the one hand, and the propriety of putting him on his deliverance before a second jury on the other hand, have been fully discussed by counsel for the prisoner, and by the Attorney General for the state, before myself and both of my brethren: and I am delegated to pronounce our unanimous opinion, founded upon very deliberate consideration, that the prisoner cannot be tried again, but is entitled to his discharge, in the same manner as if he had been acquitted by the jury.

The correctness of this opinion depends principally, if not

entirely upon a proper understanding of the facts, and the inferences from them, which are stated in the record, as the grounds of the order for the discharge of the jury. We premise, therefore, that it seems clearly to us, that the judge of the Superior Court did not act upon the idea of the state of the health of the two jurors being such as to destroy or impair their capacity bodily or mental, for duly considering the prisoner's case, and coming to a verdict satisfactory to themselves; or of its being such as to render longer confinement on the jury, with the refreshments and attendants allowed by law under the sanction of the court, likely to endanger the lives of the jurors, or probably produce great or lasting injuries to their constitutions. Indeed the affidavits of the jurors fall far short of presenting such a case, and much less are they sufficient of themselves to establish it without any judgment of the court given in the record on the affidavits as evidence. His Honor refraining from pronouncing any such decision of his own upon the evidence, proceeds in his discretion, to discharge the jury: being of opinion that it was in law a matter of discretion, it is probable that he purposely withheld his judgment as to those facts; nay it is yet more probable, from the evidence set forth, that in his judgment, the jurors were not in fact incapable or unable to proceed in the trial, and for that reason he did not find those facts in the record.

Certain it is, that the facts are not stated as having been found by the court, but only the testimony of the jurors; and it is stated that the order was made in the exercise of the discretion of the court. Discretion is evidently used (165) in contrast and contradistinction to necessity; and the evidence was inserted in the record, not for the purpose of giving legal validity to the order, but for the purpose of preserving a memorial of the ground of it, and to show that it was a discreet and not an arbitrary order. Even if the power to discharge a jury be discretionary in the court, it ought certainly to be exercised with great caution, and only under urgent circumstances, denoting at the least, great inconvenience in proceeding in the trial; and a judge honestly assuming a responsibility, naturally desires that the evidence of the reasons for his act, whether adequate or inadequate, should be as permanent as the evidence of the act itself. Our

conclusion, therefore, from so much of the record as speaks of what was done in the Superior Court, or by that court touching the discharge of the jury, is, that the judge ordered the discharge, and intended to say that he ordered it, not upon any necessity, but as being a thing within his discretion; and because this was a proper case for the exercise of this discretion upon his official responsibility. No doubt it was thus expressed in the record, that the question might be distinctly presented, whether this be a discretionary power of the judge presiding at a trial or not; and for the purpose of saving to the prisoner the benefit of the law, if his Honor should be mistaken as to the nature of the power. Our conclusion is further confirmed by the language of the judge in assigning his reasons for remanding the prisoner. He refers to *Spier's case,* and states his wish to have the doctrine laid down in it reviewed; and in his hope that it will be reversed, it is manifest from the dissimilarity of the two cases, that the allusion was not to the point decided in *The matter of Spier,* 12 N. C., 491, but to the doctrine discussed by the judges, and the general reasons which led to the particular decision. In that case, the jury was not discharged by the court, but the term of the court expired, so that the jury could not give a verdict. In the present case the court discharged the jury, and without any such cause, which cannot indeed exist, since the act of 1830. Our understanding therefore is, that the record presents and was intended to present, but the single question before mentioned—whether a jury charged in a (166) case of capital felony, can be discharged before rendering a verdict at the discretion of the court, and the prisoner again put on his trial before another jury? We think that there is no such discretion; and that the jury cannot be discharged without the prisoner's consent, but for evident, urgent, overruling necessity, arising from some matter occurring during the trial, which was beyond human foresight and control; and generally speaking, such necessity must be set forth in the record.

For this principle, and for almost the words in which we lay it down, we are indebted to *Spier's case.* The whole scope of the reasoning of the judges, who delivered their opinions upon that occasion, is decidedly and warmly against such a discretion, as being contrary to the common law, and so dan-

gerous to the liberty and security of the citizen, that the doctrine ought not to receive the least countenance in the courts of this country. Certain exceptions, founded upon necessity, and already established by judicial decisions, are recognized in that case, and a willingness is professed to admit others founded upon a reason alike forcible and conclusive. But Chief Justice *Taylor,* says, "that all the exceptions ought to be confined to those cases of extreme and positive necessity which are dispensed by the visitation of God, and which cannot, by any contrivance of man, be made the engines of obstructing that justice, which the safety of all requires should be done to the state, or weakening the efficacy of, or rendering illusive that maxim of civil liberty, of which the prisoner claims the benefit." In applying the doctrine thus expressed, the court there refused to incorporate into the law, as an exception to the ancient rule, the case of the term expiring before the trial was had, and as far as appeared, could have been completed. These principles we are now called upon to overturn, as being unsound in themselves, and condemned by those who view the subject in the better lights of the present day. It is, in our opinion, a bold and hazardous assumption in judges, to change and upset settled law, under the pretext that it was adopted in a state of society to which it was suitable, but that
(167) circumstances have now so varied, and the opinions of mankind so changed, that the rule has become inconvenient and unsuitable, and ought therefore to be altered. If the law were unalterable, but by judicial decisions, the argument would be full of force. It is true, that the exigencies of society have, from time to time, obtained, in some instances, judicial modifications of ancient rules of law, but this has been effected by slow and almost imperceptible degrees, and without a recurrence, at those times, to first principles, until a succession of inadvertent departures from the old rule, have so strongly established exceptions to it, that a court subsequently reviewing the whole ground, finds it more difficult and dangerous to attempt to re-establish the principle in its integrity, by retracing the steps of those who had lost sight of it, than to receive and enforce the rule, with its exceptions, all as they came down to us. But a wilful disregard of a clear maxim of the common law, found in the works of those reverend authors, to whom, as the fathers of that law, appeal is made

for its text, and promulgated through the recorded decisions of our predecessors, as its professors and ministers, is almost, if not entirely, as indefensible, as the like disregard of the injunctions of a statute. The legislature may pass an unwise law, one in conflict with the usages of the country, and incompatible with its enlarged and varied interests; it is still the law; and a judge cannot abrogate it, by construction, upon the ground that it was, or has become impolitic; neither can he rightfully counteract a positive precept of unwritten law, sanctioned by adjudications for ages past, upon the ground that the sages who established it, could not foresee our condition, and therefore, that succeeding judges must either retreat or advance, to suit the times. Courts cannot thus change their position, and frame anew original rules of law, or introduce exceptions not before found, either in terms or in principles. We must say, therefore, that the doctrine and decision in *Spier's case,* are deemed by us as conclusive authority upon the question before us. It is true that it was not a judgment of the Supreme Court as a court, because the case was not an appeal, but upon a *habeas corpus,* on which the Judges had only the power which any other judges, or a single (168) judge, possessed. The superior authority of the case rests upon the number of judges called to its decision, and the opportunities for full discussion at the bar and on the bench, consultation and deliberation; all of which took place. We believe few question were more anxiously considered by the judges of that day, than those involved in that case were; and for the correctness of the judgment, the main reliance of the judges is upon the maxim of the common law, as lying at the foundation of the security against injustice and persecution, provided by that law for the innocent. But the respect to be shown to that case by no means depends alone on its authority as a solemn decision, nor on the intrinsic excellence of the argument of the judges. It has subsequently been judicially recognized and sustained; and, moreover, not only acquiesced in, but in a remarkable manner, incidentally approved by the legislature. It is certain, that before *Spier's case,* which was decided in July, 1828, prisoners had in several instances, been remanded to prison by the judges on the Circuit, when the term expired before a verdict was given, and had been put on their trial again at a subsequent term. Such cases

had occurred within my own experience, while at the bar; and when on the Circuit bench, I had more than once adopted the same course. But to me certainly, and to any one of the other judges thus acting, as far as I heard, or had the least reason to suppose, this was not on the idea that it was in the discretion of the court to discharge the jury, and retry the accused, or not to do so. We did not discharge the jury—the law itself dissolved the court, and necessarily released and dispersed the jury. I never knew a jury in a case of felony, to separate by leave of the court, until the court had no power to keep them together; nor has a tradition of such a practice at any time, in this State, reached us. As the capacities and legal existence of the jury were lost by the efflux of time, under the operation of law, that was considered to be a case of legal and physical necessity, which rendered it impossible for the jury to ascertain either the guilt or innocence of the prisoner, and for that reason we con-
(169) ceived that we were not merely at liberty to bring him to trial again, or not, as might seem to us meet, according to the circumstances, but that we were obliged so to do. So far from its then being deemed a matter of *discretion,* it was thought the court had *no* discretion whatever upon the subject, but was *bound* to proceed to a second attempt to obtain a trial, the first having, from necessity, proved altogether ineffectual. It is not to be denied, that for reasons like these, the point ruled in *Spier's case,* was not satisfactory to the profession; and nearly concerning, as it did, the public justice, as well as the integrity of the trial by jury, and the security of the citizen, it attracted very general attention. At the succeeding session of the General Assembly, a bill was introduced to correct the supposed evils of the decision, by authorizing the party to be put again on trial. Instead thereof, a proposition, by way of amendment, was offered, that the term should be prolonged some certain days, for the purpose of taking the verdict. But it was found to be so invested with difficulties, touching the rights of the accused, and with inconveniences, from the loss of the court in an adjoining county, while the judge was awaiting the action of the jury, who might even then not be agreed within the enlarged, but limited period, that the whole subject was postponed, without any final action upon it.

In this state the question was, when the first change in the members of this court occurred, upon the demise of Chief Justice *Taylor*. Upon my succeeding him in December, 1829, it was immediately revived in the *Matter of Peter Slaughter*. The case is not reported, but the prisoner was brought before all the judges of the court on a *habeas corpus* from Anson, in June term 1830. The facts were, that the jury was empannelled on Thursday morning of the term, retired to consider of their verdict on Friday night, and fifty minutes before twelve o'clock on Saturday night, upon being sent for by the judge, declared that they had not agreed and could not agree; whereupon, the court, as the term was expiring, remanded the prisoner and discharged the jury. The case was elaborately argued for the prisoner by my brother *Gaston*, who had also been of counsel for (170) *Spier;* and for the state, by his Honor *Judge Saunders*, then the Attorney-General. All the authorities cited in the first case, were re-examined, and every other which research could discover, was adduced; among them were the *United States v. Perez*, 9 Wheaton, 579; and the *Commonwealth v. Thompson*, in the General Court of Virginia, in 1813, which is found in 2 Wheeler Crim. Cases, 478. The latter case was precisely in point with *Spier's*. The jury separated at the end of the term, without any order by the court; upon which case, the General Court, eight judges being present, was of opinion, unanimously, that inasmuch as the judge did not undertake of his own authority to discharge the jury, but had kept them together the full legal term of the court, and they were then necessarily separated by law, the prisoner was not discharged from further prosecution. In the case of *Perez*, besides others in several of the state courts in this country, the power of the court in its discretion to discharge the jury, is certainly recognized in its greatest extent; and it was upon the authority of those cases, zealously contended for by the attorney-general in *Slaughter's case;* but we were all agreed that there was no such discretionary power in a case of felony, known to the common law of England in its ancient purity, nor as administered in the more modern times of an independent judiciary; and that nothing short of an apparent, flagrant and uncontrollable necessity, would justify such discharge, and authorize a second trial.

Although the doctrine of this discretion has been thus promulgated by some of the American courts, it is remarkable that not a single instance of its exercise or assertion, can be found in the English books, since a period was put to an arbitrary prerogative, and judicial servility, by the expulsion of the Stewarts. Since the revolution in 1688, a jury has not been discharged in that country, except upon an absolute disability of the prisoner to conduct his defence; as if he became insane, or suddenly ill during the trial; or the inability of the jury from like causes, to proceed in the trial; or other similar physical necessity and dispensation of Providence,
(171) except it be on the side of mercy, for the benefit, and at the request, or at least by the consent of the prisoner, as in the *Kinlock's case*. It is a discretion not only momentous to the accused, but of all others, tending most directly to bring upon the administration of justice, and the ministers of the law, suspicion and odium; and that at the very period when a general sense of the purity and impartiality of the judicial tribunals is most necessary to their efficiency, and to calming and satisfying the public mind. At present the judges of the United States, may discharge juries, without alarming the fears of the profession, or exciting the jealousy of the people; but if it should happen that in times of fierce faction and political troubles, such a step should be taken in prosecutions instituted by high executive officers, or in which they have a personal concern; or for treason growing out of extensive sectional commotions, and perpetrated by a forcible resistance to the execution of a law, supposed to be peculiarly oppressive to a large section of the country, the bar, ever sagacious in descrying danger, sensitive to the abuse of power, and prompt and bold in defence of liberty, would be aroused, and the country at large agitated to its extremities.

The power is not necessary or useful to public justice, for if twelve men indifferently chosen, after full argument upon the evidence, and instruction from the court upon the law, and opportunity for full deliberation, be not agreed of the guilt of the accused, he ought to be acquitted. The law anticipates a verdict in every case; and although from the constitution of the human mind, it cannot be supposed that the evidence will make the same impression upon every juror, yet it is

probable that by consultation, they will ultimately come to the same conclusion; if to no other, that the whole jury, upon the fair and invincible doubts of a part of their body, will adopt one favourable to the prisoner, since in a case of real doubt, the law leans to the presumption of innocence. There is therefore no foundation for the notion of a *moral necessity,* for the discharge of a jury on account of a *moral disability,* as it is called, on the part of the jury to make up their minds alike, and agree on a verdict, after a *reasonable* (172) period for consultation. It is doubtless a relief to the jury, to be freed from longer confinement and privation, which is the consideration from which this practice seems chiefly to have grown up. So it would be in a still greater degree, if they were not called to this service at all, for it is a severe one; and no duty can be more painful, than that of pronouncing a sentence which cuts off the life of a fellow man. Probably its painfulness causes, in numerous instances, the occasions for the discharge of juries, since they have been told that the court can discharge them upon their own allegation of moral disability. But it is not to the ease of the jury in these respects that the law has regard, but to the administration of its own justice between the public and the prisoner, in a manner safe for the former, and securing the latter from prolonged and repeated prosecution. For these reasons in *Slaughter's case,* my senior brethren, *Chief Justice Henderson* and *Judge Hall,* in affirmance of the decision in *Spier's case,* discharged the prisoner. In the general doctrine, I concurred throughout. I own I did not unite in the order; but it was entirely because I thought the reasoning not applicable to the particular case. I still retained the opinion, that if a trial be going on in a court whose term is limited by law, and expires before the trial can be gone through, it was a case in which inevitable necessity, in legal contemplation, prevents a verdict from being given. There may indeed be cases, and in modern times they are not unfrequent, which would occupy the whole of one of our terms; and if the failure to conclude them within it by verdict would acquit the accused, they could easily, though unnecessarily, be made to consume the whole term. I deemed it however a fair and a legal presumption, that the court and the jury honestly endeavoured to perform their duties, and that the

trial was not finished because it could not be. I did not think the prisoner ought to be tried again, because the jury did not after deliberation acquit him, but because the jury had not the opportunity for full deliberation, and were deprived of it, not by the power of the judge, but by the operation (173) of the law; on the other hand, the other judges thought that by continuance the trial might be spun out till the expiration of the term, and that the admission of this exception to the ancient and approved rule, might be thus used, as the means of helping out a defective case, upon a second trial; and as an instrument of oppression to a prisoner; and as the inconvenience admitted of remedy, by enlarging the terms of the courts, they chose to leave it to the legislature to change the law, on the side that might seem to it best, rather than adopt of themselves a principle that might put the innocent in jeopardy. Of course I then felt that in a judicial capacity, I was concluded as to the law upon this point, and have ever since yielded my assent to this application of the rule. It became however, absolutely necessary that the legislature should interpose in some way, otherwise many offenders would escape, and justice to suitors be obstructed by trials for felonies, in which the prisoners would run against time. It was open to the legislature, to confer on the courts the general discretion to discharge one jury and empannel another; or if actuated by the reasons which governed my opinion upon the particular question, to enact that a prisoner should be tried at a subsequent term, if a jury charged with him at a former term, did not give a verdict before the expiration of the term; or to enlarge the term, so as to give all possible opportunity for the first jury to make up and render a verdict. The last of these three, is the remedy provided in the wisdom of the legislature, by the act of 1830, c. 22, "For the more perfect administration of justice in capital cases;" which authorizes the judge to adjourn the court from day to day, indefinitely, for the purpose of finishing the trial, and rendering judgement in a capital case commenced previous to the expiration of the regular term. It must have been obvious to the General Assembly, that this method might often prove highly inconvenient in breaking in upon the subsequent court or courts of the circuit. It therefore would not have been surprising, if it had been de-

clared that a failure of the jury to render a verdict either way during the term, should not be an acquittal. But so strong was the suspicion of improper practices to (174) protract the trial, and to prevent a verdict, which might be as well on the one side as the other, that the legislature preferred the inconvenience of delaying justice in the adjoining counties, to the probable mischief of corrupting and perverting it in the momentous cases of capital felonies; much more must they have preferred it to the entire abolition of that humane, safe and sound maxim of the common law, which commands the judge to keep the jury together until they be agreed of their verdict, and denies to him the *discretion* to discharge them. For if the legislature refused to sanction or allow an exception to that maxim, in the strongest possible case that can be imagined, for admitting any exceptions, namely, when the court was *prevented by the law itself,* from performing the duty of keeping the jury together, the inference is irresistible, that they deemed the rule itself to be in the highest degree salutary; and meant to preserve it inviolate from their own acts, and yet more from the encroachments of the judiciary. Since then, the jury are to be kept together until they be agreed, they *must* agree, at least in a capital case. This is not deemed impossible in any case;—nay it is deemed certain for the reasons before drawn from the just and legal presumption to be deduced in a case of this grade, from doubts of the prisoner's guilt. To this confinement of the jury there is no limit, but that which arises from the apparently utter impossibility for attaining the end for which the jury is to be kept together—the unity of their opinions. That impossibility is not apparent, until by mental alienation or bodily disease, suddenly dispensed by Providence, or induced by exhaustion from long confinement and privation, a juror becomes incapable of further discussion and deliberation. When such becomes the state of facts, *there is a necessity* for the discharge of the jury; first, because we have no right to keep in peril the life of the juror; and secondly, because his mind cannot yield its assent to the verdict pronounced in his name.

Having thus brought down the history of this question in this state, we may safely inquire for any question that has ever been seriously debated, upon which a judge is more

(175) perfectly concluded by authority. We think there cannot be one in which we would be less at liberty to act on any speculative reasons of convenience or justice of our own; but we must be permitted at the same time to declare, that had we now to choose for the first time between the discretion of the judge, and the fixed principles of the common law, forbidding the discharge of a jury in a capital case, except by necessity, physical or legal, we should, upon *principle,* unhesitatingly adopt for ourselves and our posterity, that which we now enjoy by descent from our forefathers. We cannot change this law. *Chief Justice Taylor* may have been mistaken, in thinking as he did in *Spier's Case,* that the rule then established must be that for all posterity, unless the legislature should think proper to interfere; and there may hereafter be judges, who, without such interference, will advance to the change from law to discretion upon this point; but it will most assuredly not be in our day. We abide by the law as we find it established in remote antiquity, acted on in the purest periods of English liberty, and enforced by our predecessors in the places we now occupy.

Lest it should be supposed that the case which happened upon the trial of the prisoner falls within the rule as acknowledged by us, and therefore that he was remanded properly, though not upon the reason awarded by his Honor, it is necessary to remark, that as to matters of fact, we can look only to such as are set forth in the record *as facts.* A record imports absolute verity as to all matters which are stated in it as occurrences on the trial, because the law reposes entire confidence in the integrity of the court. The judge presiding, and he alone, can know, whether the proof offered before him to establish a fact as then existing, is true, and therefore the special matter set down by him is conclusive; and no other court or judge can weigh the credibility of the witnesses, and infer one fact from another that was proved. It is certain to us, for instance, that the two jurors deposed as is stated, to the condition of their health; but if they had even sworn that they were reduced to impending dissolution, the truth of that allegation would not thereby appear to us, but (176) only to the judge presiding, who had it in his power to adopt various other means—such as advice of professional men, his own inspection, and the like, to satisfy his

mind. If, therefore, the record had set out as fact, that one of the jurors had become so diseased as to endanger his life, or render a permanent injury to his health highly probable; that he had thereby become unfit or unable to serve longer on the jury, the fact would be established by the record, although no evidence appeared thereon in proof of the fact: so, on the other hand, when the record states the evidence only, the fact is not established by the record: and being a fact occurring in a proceeding in a court of record, it can be established by no other evidence. We have therefore abstained entirely from considering the testimony of the jurors in reference to the conclusions that might be drawn from it; for if it did not satisfy us that the jurors were unfit or incapable of longer service, we could not contradict the record, if it had stated that fact to be the other way. Our decision is therefore founded upon this, that the record shows that the jury was discharged without, in explanation thereof, showing any state of facts from which the discharge becomes *necessary*. This is indispensable, because by no other means but the record, can the necessity appear, and by that it can always be made to appear, with the single exception of the sudden insanity or death of the judge during the trial—a case not yet decided, and which may probably found another exception, upon necessity to the general rule.

Upon the whole, therefore, we are clearly of opinion, that the prisoner must be discharged upon the payment, by his master, of such costs as he is legally liable for, and upon his entering into recognizance for the appearance of the prisoner at the next term of the Superior Court, to answer any other charge the state may have against him.

Cited: *State v. Morrison,* 20 N. C., 114; *State v. Godwin,* 27 N. C., 404; *State v. Prince,* 63 N. C., 530, 533; *State v. Woodly,* 47 N. C., 284; *State v. Tilletson,* 52 N. C., 115; *State v. McGimsey,* 80 N. C., 379; *State v. Davis, Id.,* 388; *State v. Washington,* 89 N. C., 538; *State v. Gooch,* 94 N. C., 985; *Lowe v. Elliott,* 107 N. C., 719; *Osborn v. Wilkes,* 108 N. C., 666.

(177)

THE STATE v. SAMUEL, a Slave.

1. The marriage of slaves in this State, consisting of cohabitation merely, by the permission of their owners, does not constitute the relation of husband and wife, so as to attach to them the privileges and disabilities, incident to that relation by the common law. Hence, *it was Held*, that a slave who was the wife of another slave, might give evidence against him, even in a capital case.

2. But if the wife of a slave were incompetent to give evidence against him during their cohabitation as man and wife, yet she would undoubtedly be admissible after they had separated, and she had become the wife of another slave.

3. An indictment for the murder of a slave may conclude at the common law.

This was an indictment for murder, tried at Caswell on the last Circuit, before *Settle, J.*

In proving the case for the state, the solicitor called as a witness, a slave named Mima, who was the only person that saw the rencounter in which the murder was alleged to have been committed. The prisoner's counsel objected to the competency of the witness, upon the ground that she was the wife of the prisoner; and to sustain this objection, A. M. Lea, the owner of the witness, was introduced, who testified that the prisoner and witness Mima, had cohabited as man and wife for about ten years successively, and had had five children; that in the month of August last, he heard a quarrel between the prisoner and Mima, when the prisoner took a bundle of clothes, which he was about to carry off, saying, he intended to part with his wife. Lea compelled the prisoner to leave the clothes, and told him to bring an order from his master if he wished to take them away. In the course of a fortnight, the prisoner returned with an order from his owner, procured the clothes, and was commanded by Lea not to return. Soon afterwards the deceased applied to Lea for permission to take Mima as his wife, and upon being told that he might do so, he took her as a wife accordingly. His Honor overruled the objection to the competency of the wit-
(178) ness Mima, and the prisoner was convicted. A new trial was moved for and refused; upon which a motion in arrest of judgment was submitted, because the indictment

concluded at common law; but this being also overruled, and judgment of death pronounced, the prisoner appealed.

W. A. Graham, for the prisoner.
The Attorney-General, for the state.

RUFFIN, Chief Justice: The question of evidence made in this case, is not without difficulty; but, after the best reflection the court could bestow on it, that difficulty seems to arise rather from moral considerations than to be founded on legal principles. As far as our experience extends, or our researches into the adjudications of our sister states enable us to discover, the question is entirely new. The objection to the competency of the witness is, that she is the wife of the prisoner, and cannot be compelled or allowed to give evidence against him. The novelty of the attempt to apply this rule of the law of evidence, to this relation between slaves, is, perhaps, a sufficient reason for not yielding to it. The inclination of the courts now, is, to hear every person, who is not clearly excluded by a positive rule precisely embracing the witness offered; and thus leave the weight and effect to the jury. It might, therefore, be enough for us to say, that, although the occasion must have often been presented to them, it has never been decided by our predecessors, that the marriage of slaves, such as existed in this case, and such as usually exist in this state, consisting of cohabitation merely, by the permission of the owners, constitutes the relation of husband and wife, so as to attach to them the privileges and disabilities incident to that relation by the common law. But the court is furthermore satisfied that, upon principle, it could not be thus decided.

The disqualification of husband and wife, to testify for or against each other, is merely of civil institution, upon reasons of general policy. That policy has regard in the common law of England, chiefly to the peace of families, by avoiding all causes of dissension between those who, according to that law, are indissolubly joined together. No (179) code could justly, by one of its edicts, pronounce that an union between two persons once formed, should by no means be severed, and yet, by another of its edicts, coerce them to acts necessarily productive of dissensions, that would de-

prive their union of all cordiality, separate them in feeling, and make their connexion intolerable. This privilege, accorded by the law, seems manifestly, therefore, to owe its origin to the duration of the legal obligation of the contract of marriage. It cannot be yielded to any persons but such as have entered into that contract, in that rightful and formal method which is recognized in law as binding the parties throughout life, absolutely, and independent of the continuing inclinations of one or both of them, or the continuing license of any third person. Hence a marriage *de facto* will not, but only a marriage *de jure,* will exclude one of the parties from giving evidence for or against the other. There have, indeed, been decisions at *nisi prius,* in which persons not actually married, have not been allowed to give evidence *for* each other, because in the very transaction under investigation, they had held themselves out as man and wife. But it has never been doubted, that one was a competent witness *against* the other unless a legal marriage existed; and it now seems to be finally and properly settled, that in every case, whether the witness be called by the one side or the other, the test, and the only test of competency is this: are they in fact and in law husband and wife? The rule is thus stated in Starkie's Treaties, 2nd part, 403, and may be received as authority, because the passage has the express sanction of *Chief Justice Best,* and the other judges of the Court of Common Pleas in *Bathews v. Galindo*, 4 Bing., 610; (15 E. C. Law, 88); in which after a long cohabitation as man and wife, and the birth of children, the woman was received as a witness for the man. There can be no other rule, with certainty enough to entitle it to the name. For at what period of an illicit cohabitation shall the incompetency begin? Or how long after the cohabitation terminates, before the competency shall be restored?

(180) It being thus the common law of England, that no length of cohabitation, and no recognition by the parties merely, of each other as man and wife, invests them, for this purpose, with that character; it is next to be considered whether a like cohabitation between slaves, constitutes, in this state, a marriage, or rather such a marriage as produces incompetency to give evidence. It has been argued at the bar, that it does; because our laws have not prescribed any ceremony or formality for the celebration of marriages among

persons of any colour or degree; and because slaves are human beings, with passions and senses impelling them to this union, and with a natural capacity to contract it, which no municipal regulation can annul, or at least, which no regulation in this state professes to annul. It has been urged that the essence of this, as of other contracts, consists in the consent of the parties; which if expressed before any witnesses, in any words, or by any acts, fully denoting present consent, renders the contract obligatory by the law of nature and of reason; and it was thence inferred, that it is necessarily binding in our law, in the absence of positive provisions to the contrary.

If every position in this chain of reasoning were true, it would not follow that to such a marriage contracted in this state, the effect is to be given of excluding the parties as witnesses. But the court is entirely satisfied, that some of those positions are not correct. We do not agree that persons *sui juris* are legally married merely in virtue of their own consent, however explicitly expressed, in terms of immediate agreement, unless it be so expressed in presence of those persons who are designated by law to be witnesses thereto. It is unnecessary to state at large the reasons on which our opinion on this point rests; because no person can reflect on the subject without perceiving that such should be the law, nor read our statutes without likewise perceiving that such is intended by the legislature to be the law. The rule of the common, or rather the canon law, respecting marriages *de facto,* contracted *in verbis de presenti,* might well be adopted at a time, and in a country, in which an ecclesiastical establishment was a component part of the government, with authority, by imposing temporal penalties, and pro- (181) nouncing spiritual denunciations, to compel the celebration of such a marriage *in facie ecclesiae,* as a specific and formal execution of a contract, partly performed and binding on conscience, though not complete in law. And if one of the parties should happen to die before this duty to the other, to their issue, and to the community could be exacted, the law might in such a case, properly enough, engraft on the general rule, an exception in favour of the validity of such a contract of marriage, not duly celebrated, but continuing *de facto* until death parted those who had contracted. When, however, this function of the spiritual judge was abrogated in England,

there arose an exigent necessity that some other fixed mode should be established by which marriage should be *publicly* celebrated, and some solemn memorial thereof preserved. While as to other contracts, security is provided in various ceremonies and solemnities, a well regulated state could not leave that of marriage—the most important of all, in reference to the happiness of the parties and their issue, and to the right of succession to estates—to be established or denied upon the loose testimony of perhaps a single witness, speaking entirely from memory, of the words of the parties. In this state there never was a jurisdiction similar to that of the spiritual courts in England; and it is plain from the earliest period of our legislation, that in consequence thereof, it has been constantly required as an essential requisite of a legal marriage, that it should either be celebrated by some person in a sacred office, or be entered into before some one in a public station and judicial trust. The very first chapter found in our oldest statute book, 1715, c. 1, contains such provisions on this subject, as one of vital importance to the prosperity of the young colony. From the terms of that act, and of those subsequently passed in 1741 and 1778, and the constant usage ever since, the court considers this to be clearly the law in this state.

If that be the law of marriage between free persons, upon what principle or pretext can a marriage between slaves, not thus contracted, be sustained as a marriage *de jure?* (182) How can that be deemed to any purpose a legal marriage, which does not, in any respect, conform to the only legal regulations upon the subject of marriage? If it be said, that the statutes relate only to the cases of free persons, and therefore do not require the marriages of slaves to be *thus* celebrated; the reply is obvious, that the marriage of slaves, then, is wholly pretermitted, and hence a legal marriage cannot be contracted between them. Such, indeed, may unfortunately be the law; and may have been intended by the legislature to be the law, upon the general ground of the incapacity of a slave to enter into this, as into other contracts, upon the presumption of the want of free consent, and upon the further ground of the difficulty of giving legal validity to the marriage, in respect to its most important legal incidents, without essentially curtailing the rights and powers of

the masters. If it be so, it may be a fit subject for legislative interposition, to avert this melancholy addition to the misfortunes and legal disabilities of this depressed race. The subject is too full of perplexities, to authorize the court to express an opinion upon that point, without duly considering it in a case in which it shall directly arise. Assuming for the occasion, therefore, that marriage is an exception from the principle on which their contracts generally are deemed null, and that in law they may marry, yet, in the absence of particular regulations for the marriages of slaves, to give validity to a marriage contracted by them, it must be such a marriage, as, by the general law, is valid. It is not the province of a court to pronounce a contract binding, and annex to it all the consequences of another contract, to which those incidents are legally attached, only when it is attended with certain ceremonies, unless the particular contract have also those formalities. The rule, to dispense with them in particular cases, must be laid down by the makers of the law, and cannot be interpolated by its expounders. It cannot be judicially determined, that a wife by cohabitation, shall not give evidence against the man with whom she lives, more than that the other marital rights shall be accorded to them; nor, more than we can pronounce, that a man has incurred the guilt of bigamy, or cohabiting with one woman, under the (183) name of his wife, after abandoning, or being forcibly separated from another, with whom he had once lived on the like terms. Unless the one consequence would follow, the other cannot; and the court is not prepared, without a mandate from a higher authority than our own, to apply to this class of our population a rule, which would in innumerable instances, either subject them to legal criminality of a high grade, or deprive them almost entirely of their greatest solace —that of having families of their own, frail as may be the right, and temporary the enjoyment, dependent, as they are, upon the caprice of the parties themselves, and yet more upon the necessities or caprice of their owners. The opinon of the court therefore is, that the witness was never in law, the wife of the prisoner.

This conclusion is in no degree shaken by the incidental notices of this connection between slaves, which is found in some of our statutes. In the act of 1729, (*Rev. c.* 19) for

instance, which provides against hunting by slaves, their travelling by night, and collecting in quarters among other persons' negroes, the ninth section, by way of proviso to those enactments, declares, that nothing in that act shall be construed to hinder neighbours' negroes intermarrying together, license being first had of their several masters. This does not profess to say what shall constitute their marriage, nor what consequence such a marriage shall draw after it. All those subjects are left to the general law. It is manifest too, from the manner in which the proviso comes in, that the object was merely to exempt from punishment particular slaves that might be found on another plantation, under the circumstances mentioned. Thus viewed, and in reference to the general law of marriage, and also to the known usages and modes of forming this connection between slaves, this proviso can mean only that concubinage, which is voluntary on the part of the slaves, and permissive on that of the master—which, in reality, is the relation, to which these people have ever been practically restricted, and with which alone, perhaps, their condition is compatible.

(184) It may, however, be here observed, that the witness in this case was clearly competent, upon the same course of argument, on which her incompetency was urged; for if the contract of marriage between those persons be valid, upon the ground of their agreement simply, by force of natural law, and independent of municipal regulation, it follows that its obligation and duration may and must be limited by the same means; namely, by the terms of the agreement originally made, and that it may be rescinded by a new agreement. The authority of the Divine law, as to what this agreement ought to be, or the duties which, under its influence, the conscience of the parties may prompt from one to the other, are subjects with which civil tribunals cannot deal, without the aid of municipal law. As an agreement between the parties, its extent depends upon the terms of the agreement itself, and its continued existence. In this case, there is no evidence that the cohabitation commenced upon any agreement—that it was to continue longer than it should be mutually satisfactory to the parties; and if there had been, it is clear that it had been dissolved by a change of inclination on each side, which had ended in an agreement to separate, and in actual

separation. Indeed, the witness had become the wife of another man, in the same sense in which she had been that of the prisoner; and is, therefore, either a competent witness, or guilty of bigamy. It is not difficult to determine between those alternatives.

A motion was also made in arrest of judgment, because the indictment concludes at common law. Whatever doubts formerly existed on that point, none have been entertained since the declaratory act of 1817, (*Rev. c.* 949) and *State v. Reed,* 9 N. C., 454. The very candid and discreet judge who dissented in that case, either altered his opinion, or gave it up to the authority of that adjudication. In the subsequent term, he united in the judgment in *State v. Hale,* 9 N. C., 582, that an assault upon a slave, by a stranger, was an offence at common law; a judgment concurred in several times since by this court, and sanctioned by the whole country.

The Court is therefore of opinion that there is no (185) error in the record, and directs that it be thus certified to the Superior Court of Caswell, that the judgment may be executed according to law.

PER CURIAM. Judgment affirmed.

Cited: Howard v. Howard, 51 N. C., 236; *State v. Taylor,* 61 N. C., 512; *Cooke v. Cooke, Id.,* 587; *State v. Harris,* 63 N. C., 4; *State v. Melton,* 120 N. C., 598; *State v. Wilson,* 121 N. C., 656.

BENJAMIN OVERMAN v. BENTON CLEMMONS, Exr. of JAMES CLEMMONS.

1. To an action of debt upon a bond it may be pleaded, that the bond was given upon the consideration of the plaintiff's using his influence to procure a certain marriage for the defendant; and if the issue upon such plea be found for the defendant, it will avoid the bond.

2. To authorize the admission in evidence of a paper purporting to contain the substance of a letter sent to the plaintiff, to which he had returned an answer, *it was Held* to be sufficient, after a notice to produce the original, to prove, that at a particular time, a letter written to be sent to the plaintiff, and the same in substance with the paper then offered, was seen and read by one witness, though he did not see it sealed and delivered to the messenger; and that another witness about the same time carried a letter to the plaintiff, from whom he received another letter, which the plaintiff told him was in answer to the one he had brought.

3. A letter sent to one of the parties cannot be given in evidence to prove the facts stated in it; but if the party to whom it is addressed write an answer thereto, such answer can be read against him; and the letter must also be admissible to explain the answer. The letter and the answer form together a written conversation.

4. A marriage settlement in which the plaintiff was a trustee for the intended wife, may be given in evidence, to show the plaintiff's influence with her, where evidence of such influence is admissible; but it is very slight evidence, and can be used for that purpose only.

This was an action of debt, upon a single bond, for the payment of the sum of five thousand dollars, and dated 13 February, 1834. The defendant, among other pleas, pleaded *"non est factum;"* "that the bond was obtained by fraud;" and specially, "that the bond was given by James Clemmons, the defendant's testator, to the plaintiff, in consideration of the plaintiff's using his influence with Mrs. Esther Hargrave,

(186) to procure a marriage between the said James Clemmons, and the said Esther Hargrave." Upon the issues joined, the case was tried at Caswell, on the last Circuit, before *Settle, J.*

After the plaintiff had proved the execution of the bond by proof of the testator's handwriting, the defendant offered evidence to show that the bond was a marriage brocage bond. To this the plaintiff's counsel objected, upon the ground, that if the fact were admitted to be so, the defendant could not avail himself of it as a defence in a court of law, but would have redress in a court of equity only. The court overruled

the objection, and the defendant then offered in evidence two papers, one purporting to contain the substance of letter written by John W. Blackwell, a son-in-law of the testator, to the plaintiff; and the other was a letter from the plaintiff to Blackwell in reply. To authorize the reading of the first paper, the defendant proved, that notice had been given to the plaintiff to produce the original letter; which was not produced by him. A witness was then called, who testified, that he saw a letter written by Blackwell, to be sent to Overman, the plaintiff: that it was written a few days before the death of James Clemmons: that he was called upon by Blackwell to read it; and that the paper then offered was in substance the same with the letter: that when he saw the letter, it was not signed by Blackwell, and he did not see it sealed up or delivered to the messenger. The defendant then proved, by a brother of John W. Blackwell, that a few days before the death of James Clemmons, and on 20 Dec., 1834, he, the witness, received from his brother a letter sealed up, and directed to the plaintiff, which he carried and delivered to the plaintiff, and on the same day received from him a letter, which he told witness was a reply to the one which the witness had delivered; and which was the same paper that the defendant then offered as a letter from the plaintiff to Blackwell. The plaintiff's counsel objected to the introduction of this paper; first, because it was not sufficiently identified; and, secondly, because it was not pertinent to the issues. The court overruled the objections, and the paper was read. After mentioning the extreme illness of James Clemmons, and his great distress of mind about a note for five thousand dollars, which he said the plaintiff held against him, (187) the writing proceeded: "he (Clemmons) "said, you" (the plaintiff) "joked him, and told him, if you would assist him in getting him married to Mrs. Hargrave, he must give you five thousand dollars. He further stated, that when he was putting on his clothes to get married, you presented him with the note to sign, and you threatened him, if he did not sign the note, you would break up the match; and that he then done so." The plaintiff's reply, which was dated 20 Dec., 1834, after acknowledging the receipt of Blackwell's letter in relation to Clemmon's note, proceeded: "I have such a note in my possession, but deny some of his assertions in

regard to it; it was a voluntary thing on his part, and he told me to write after we went into the room to put on his clothes. He had the paper and pen and ink in his trunk—all this was after he had signed the instrument of writing between Mrs. Hargrave and himself, which I had no hand in whatever; it was a match entirely between themselves and their attorney. I deny saying that I would insure him the property, or that I would break up the match, or attempt it, if he did not sign the note: he was perfectly willing to do so, but said, if any thing should happen that they should not marry, what would be the consequence? I told him, I would give it up, under such circumstances." The defendant proved further, the marriage of Esther Hargrave and James Clemmons on 13 Feb., 1834; and then offered in evidence a marriage settlement executed between the parties on the same evening, but before the marriage, in which deed of settlement the plaintiff, who was a brotherin-law of Mrs. Hargrave, was one of the three trustees. The introduction of this paper was objected to by the plaintiff, but upon the defendant's counsel stating that the evidence was offered for the purpose only of showing that the plaintiff had influence with Mrs. Hargrave, it was received by the court, for the purpose for which it was said to be offered.

His Honor instructed the jury, that if the bond was merely voluntary, given without any consideration, the plaintiff was entitled to recover; but if they should be of opin-
(188) ion, from the evidence in the case, that the bond was given upon the consideration, that the plaintiff should exert his influence with Esther Hargrave, to induce her to marry James Clemmons, the obligor, the bond was void, as being given on an illegal consideration; and they should find for the defendant. He further charged the jury, that the marriage settlement was no further evidence in the case, than to show the influence which the plaintiff might have with Mrs. Hargrave, and to what extent it had that effect, they were to decide. As to the paper purporting to contain the substance of the letter from Blackwell to the plaintiff, his Honor charged them, that it was evidence in favour of the defendant as to the allegations only contained in it, which were admitted by the plaintiff in his answer. The jury returned a general verdict, finding "all the issues in favour of

the defendant." The plaintiff moved for a new trial, which being refused, he appealed.

W. A. Graham, for the plaintiff.
Nash, for the defendant.

GASTON, Judge: We have somewhat doubted whether the questions which have been discussed in this case, arise upon the record. The defendant pleaded generally *non est factum;* and specially that the supposed writing obligatory was given to secure payment unto the plaintiff, of the sum of money therein mentioned, as a consideration for the plaintiff to use his influence to procure a marriage between the defendant's testator and Esther Hargrave. To this plea the plaintiff replied generally, and thereupon an issue was also joined. Upon the trial of these issues, evidence was offered tending to establish the special plea, when the palintiff objected to the introduction of any testimony for that purpose, upon the ground that the matter so pleaded, furnished no defence against the plaintiff's action. The court overruled the objection and instructed the jury, that if they found the matter so pleaded to be true, the plaintiff was not entitled to recover. Other objections were taken to a part of the evidence offered in support of the special plea, which were also overruled by the court. A verdict was found for the (189) defendant upon *both issues;* the plaintiff moved for a new trial, which was refused; and judgment having been rendered for the defendant, the plaintiff appealed. The difficulty is in our seeing judicially, that the finding against the plaintiff on the general issue, was produced by any error of the court. All the objections taken, are to evidence applicable to the other issue—and perhaps it might have been, that the plea of *non est factum* was found because of insufficiency of testimony to establish the execution of the instrument, or of the erasure, or other matters properly submitted to the jury under *that* plea. The presumption on the record always is, that a verdict is supported by sufficient evidence until the contrary be shown. Now if this presumption be not removed here, and the instrument declared on was not in truth the deed of the defendant, the defence founded on the consideration of the pretended deed was immaterial, and the plaintiff could

not be injured by any error, with respect to the admission of evidence confined to that defence.

Notwithstanding these doubts, and although it must be admitted that the record is far from being so explicit as it ought to have been, we believe ourselves warranted in examining and deciding the questions that have been made. We collect from the record, that the instruction of his Honor, as to the legal sufficiency of the special matter alleged, was given and received, and acted upon as applicable to *both* issues. If so, and there was error in this instruction; or if there was error in admitting improper evidence of that special matter—then the finding on the general issue, as well as on the special plea, may have been produced by means of such errors, and these will entitle the plaintiff to a reversal of the judgment, and a new trial of the issues. We feel ourselves called upon to remark, that the whole proceeding in relation to the special plea, has been irregular. If the plaintiff meant to rest his case upon the insufficiency of the plea, he should have demurred to it; and if the court sustained the demurrer, none of the evidence in support of the plea could have been admitted upon the trial of the general issue; for it is not
(190) competent for the defendant on the plea of *non est factum,* to insist upon any matter which avoids the deed, either at common law, or by statute, if it do not impeach the execution of the deed. Gilbert's Law of Evi., 162; 5 Coke, 119; *Colton v. Goodridge,* 2 Bl., 1108; *Harmer v. Wright,* 2 Star. Ca., 35; (3 Eng. Com. Law, 232); *Harmer v. Rowe,* 6 Maule & Sel. 146. If the court overruled the demurrer, and gave judgment for the defendant, the error if any, would have distinctly appeared upon the record. As the plaintiff did not demur to the plea, but traversed the matter pleaded, he could not object to evidence which was relevant to support the plea; but unless other matter was brought forward, proper to be received under the plea of *non est factum,* and he proved the due execution of the writing obligatory, he was entitled to a verdict upon the general issue. If the jury found for him upon the general issue, and for the defendant upon the other, the plaintiff might yet have contested the sufficiency of the special plea, by praying judgment *non obstante veredicto.* It would seem that without regard to forms, the parties contested all the matters in controversy,

as well those of law as of fact, before the jury; contenting themselves with praying from the court instructions upon the former, so as to enable the jury to come to a correct conclusion. Perhaps in this case, no mischief has resulted from the irregular course pursued; but it ought to be avoided as tending to blend functions, which the stability of our institutions requires should be carefully kept distinct.

The main question in dispute is, whether the consideration on which this instrument was executed, not appearing on the face of it, but alleged by plea as matter *dehors* the instrument, and found to be true, does in law avoid the instrument. Contracts promising rewards to a person, in order to obtain the exertion of any influence which he may possess over one of the parties to a contemplated marriage to bring about the marriage, and bonds entered into to secure the performance of such contracts, have for more than a century back, been declared void in the courts of equity; and under the name of marriage-brocage agreements, and marriage-brocage bonds, constitute a well known subject of the jurisdiction of such courts. It was not, however, until the case of (191) *Potter v. Hale,* or *Potter v. Read,* (as it is indifferently termed,) and then after much litigation and difference of opinion, that this doctrine was authoritatively established. In that case, such a bond was ordered to be delivered up and cancelled, by the Master of the Rolls; his decree was reversed on appeal, by *Lord Chancellor Somers;* but on appeal to the House of Lords, the decree of reversal was itself reversed, and the original decree affirmed. It is not strange, as the jurisdiction over such bonds was first effectually asserted in a court of equity that most of the cases subsequently occurring on the same subject, and to be found in the books, were brought in a court of equity. But after the principle of these adjudications was perfectly settled, it could not but be that the same principle would be asserted in a court of law, wherever the forms of legal proceedings gave occasion for applying it. These engagements had been denounced, not because of the imposition or oppression practised upon one of the parties to them, but because of their repugnancy to public policy. They were condemned as mischievous to the community, inasmuch as they encouraged hireling match-makers, invaded the peace of families, controlled the freedom of choice, and pro-

duced unequal and unhappy marriages. So unequivocally had their condemnation rested upon the ground of public mischief, that it was held that they did not admit of subsequent confirmation by the party aggrieved: *he* could not give to them validity—for the common weal forbade them. *Shirley v. Martin,* 3 P. Wms., 74, n. 1. It cannot be doubted, therefore, since the conclusive establishment of this principle, that if an action be brought at law, to recover damages for the breach of a covenant or promise, to exert this forbidden influence—or an action to recover money upon an assumpsit, founded on such illegal consideration—or an action on a bond, with condition expressing this illegal purpose—in all these cases, the court of law must pronounce the undertaking, the consideration, and the condition against law, and turn the plaintiff out of court. The *first* object of all law, is the public good; and no court will enforce private engagements, which
(192) it judicially sees are repugnant to the public good. *Ex turpi causa non oritur actio.* These positions seem to be clearly laid down by the elementary writers, and are sanctioned by the decisions to which they refer. 1 Chitty's Plead. 511, *et seq.* Com. on Contracts, Pt. 1 ch. 3, page 62; 2 Thos. Coke, 24 note p; *Mitchell v. Reynolds,* 1 P. Wms., 181; *Lowe v. Peers,* 4 Bur., 2225. They are recognized by *Lord Hardwick, in Smith v. Aykewell,* 3 Atkins, 566, who upon a motion for an injunction to restrain the defendant from bringing an action on a promissory note, given by the plaintiff for £2000, which was charged by the bill, and that charge supported by affidavit, to have been given on an undertaking to procure him a marriage with a lady—or to restrain the defendant from assigning the note, made the order to restrain the defendant from endorsing or assigning the note, but would not make the order to prevent him from *proceeding at law*—evidently because by endorsing the note, the plaintiff might be shut out from his defence; but in an action by the payee, the defence would be as effectual at law as in equity.

But it might well have been questioned, whether on a bond *simply* for the payment of money, it was competent for a defendant to allege by *plea,* that the consideration of such bond was illegal, because of repugnance to public policy, and thereby avoid the bond. This was at one time a much vexed

question, and accounts for the observation made by *Lord Talbot,* in *Law v. Law,* 3 P. Wms., 394, that marriage-brocage bonds were good at law. It must not, however, be regarded as one completely settled. The leading case on the subject, the authority of which has never been questioned, either in England or in this country, is that of *Collins v. Blantern,* 2 Wilson, 347. That case distinctly holds, that a contract to tempt a man to transgress the law—to do that which is injurious to the community, is void by the common law; and that when a bond is for the payment of a sum of money, the obligor may show by plea, that the payment was to be made on a vicious consideration—vicious either on common law principles, or because of statutory enactments; and that this shown, the writing obligatory is (193) to be adjudged void. The authority of *Collins v. Blantern* was acknowledged in the strongest terms, by the former Supreme Court of this state, in *Cameron v. M'Farland,* 4 N. C., 299, who, in conformity to it, held that the common law does not sanction any obligation, founded upon a consideration which contravenes its general policy. This impresses upon the transaction an inherent defect, which cannot be removed by the most deliberate consent of the parties, or the utmost solemnity of external form. The principle has been invariably since acknowledged in the English cases, down to the present day. *Paxton v. Popham,* 9 East, 408; *Pole v. Harrabin, Ibid.* in note; *Greville v. Atkins,* 9 B. & C., 462; (17 E. C. L., 421). In the case of *Thrale v. Ross,* 3 Bro., 57, where an injunction was applied for, to stay trial on a bond, because it was alleged to be given on a vicious consideration—the procuring the resignation of an office, or an appointment to an office—*Lord Thurlow* refused the injunction, because the matter ought to be *pleaded* at law, and the question there tried; and in argument it was stated, that in case of marriage brocage, there could be but little doubt but it would be pleadable at law, although it had not been so pleaded. In *Fytch v. Bishop of London,* 1 East, 487, it was held, that if a bond were given on account of a bad consideration, this would avoid it at law, as well as in equity. In the case of *Vauxhall Bridge Company v. Spencer,* 1 Jacob, 64, (4 Con. Ch., 28), where objection was taken to the validity of bonds, being against public policy, the Vice Chancellor

ordered the validity of the bonds to be tried at law; and Lord *Eldon,* affirming the order, declared that all the objections may be raised upon the *pleadings there,* in the same manner as *here;* and in matters of this nature, both courts of law and equity exercise jurisdiction upon the same principles. In *Cock v. Richards,* 10 Ves., 440, *Lord Eldon* expressly states, that the courts of law now do exercise jurisdiction on marriage-brocage bonds, and such contracts. In *Westmeath v. Westmeath,* 1 Dow, N. S., 519, before the House of Lords, on a bill to set aside a deed of separation between hus-
(194) band and wife, on the ground of being against public policy, *Lord Eldon* considered the question of public policy, as resting on the same grounds, both at law and in equity; that the question ought to be tried at law, and the case put in such a form, that it might be brought before the House of Lords by writ of error. On full consideration, then, of this question, we feel ourselves warranted and bound to decide, that the matter specially pleaded by the defendant, could be rightfully pleaded to this action, and being found to be true, the plaintiff's action was barred, and the defendant entitled to judgment.

An objection was made to the admission in evidence, of the copy of a letter, purporting to have been written by John W. Blackwell to the defendant, in relation to the bond in question—first, because such copy was not sufficiently identified; and, secondly, because the letter itself was not pertinent to the issue. It is to be borne in mind, that the original, of which that offered was alleged to be the copy, was delivered to the plaintiff on the 20th December, 1834; that this action was brought in February, 1835; there was no evidence to show or to raise the probability that the original was not in existence, and in the plaintiff's possession, and he was notified to produce it on the trial. Under these circumstances, the proof of the copy was such, as in our opinion authorized its being read. Stronger evidence could not have been given, unless the writer had been himself examined; and it is admitted, that he could not have been examined, as being a party in interest in the suit. The letter was pertinent for the purpose for which it was read, and the jury was instructed that it was evidence for that purpose only. A letter sent to one of the parties, cannot be given in evidence to prove the facts stated

in it, but if the party to whom it is addressed, write an answer thereto, such answer can be read against him, and the letter must also be admissible to explain the answer. The letter and the answer form together a written conversation.

An objection was also made to the admission in evidence, of the marriage settlement. It was so unimportant evidence for the defendant, as to raise a doubt whether (195) it was not pressed for some purpose not avowed, and not legitimate. But we cannot say, that the fact of the plaintiff having been elected by the bride, as one of the trustees in her marriage settlement, did not show that she reposed confidence in his friendship, and had some *tendency* to strengthen the allegation of an influence over her. It was *barely* admissible, but we believe it was admissible for this purpose; and the jury were cautioned that it was evidence for no other; and it was for them to decide as to the *effect* which it had, even in supporting that allegation.

We are of opinion that there is no error in the judgment, and that it must be affirmed, with costs.

PER CURIAM. Judgment affirmed.

Cited: Allison v. Norwood, 44 N. C., 416; *Huggins v. R. R.,* 52 N. C., 472; *Bunch v. Bridgers,* 101 N. C., 60.

(196)

THE STATE v. JOSEPH BENTON.

1. On the trial of a capital case, the names of the jurors of the original panel should be first put into the box and drawn, before those of the tales jurors are put in and drawn; and the jurors summoned under a special *venire facias*, as provided by the act of 1830, c. 27, are in this respect to be regarded as talesmen.

2. The officer prosecuting for the State, may on a capital trial direct a juror to stand aside until the panel be gone through with, which is a challenge for a cause to be shown at the end of the panel; and if a cause be then shown and disallowed, the prosecuting officer may still challenge the juror, peremptorily or not, at his discretion. But this practice of permitting the prosecuting officer to defer showing his cause of challenge until the panel be gone through, must be exercised under the supervision of the court, who will restrain it if applied to an unreasonable number.

3. A juror may be examined as to opinions honestly formed, and honestly expressed, manifesting a bias of judgment, not referable to personal partiality, or malevolence; but if the opinion has been made up and expressed under circumstances which involve dishonor and guilt, and where such expression may be visited with punishment, he ought not to be required to testify so as to criminate himself.

4. An opinion fully made up and expressed against either of the parties on the subject-matter of the issue to be tried, is good cause of principal challenge; but an opinion imperfectly formed, or one merely hypothetical, that is, founded on the supposition that facts are as they have been represented or assumed to be, does not constitute a cause of principal challenge, but may be urged by way of challenge to the favor, which is to be allowed or disallowed as the triers may find the *fact* of favor or indifferency.

5. A challenge of a juror because of his having formed and expressed an opinion upon the question to be tried, can be made only by that party against whom it was so formed and expressed.

6. The forbearing of the court to discharge a juror to whom no exception has been taken, though there be ascertained cause of challenge against him, cannot be assigned for error, because the right of challenge in the parties remains, and neither of them can be injured by such forbearance to act on the part of the court.

7. The nature and legal consequences of the practice of putting what is called the preliminary question to jurors upon capital trials, explained, and such practice, except under particular circumstances, disapproved of; and the legal and regular mode of trying exceptions to jurors, and forming juries on trials for capital offences, pointed out and recommended.

8. If one man assails another, and is about to commit an unauthorized act of violence upon him, and a third person interposes to prevent it, and is killed by the assailant, it is murder.

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The prisoner was put upon his trial at Sampson on the last Circuit before his Honor *Judge Saunders*, upon a charge

of Murder. When the jury was about to be formed, it appeared that there were present seventeen jurors of the original venire, and thirty talesman. The prisoner's counsel requested that the names of all the jurors, both those of the original panel and the talesman should be put into the box at the same time, but the judge refused this request, and directed the clerk to put the names of the original jurors alone into the box; which was accordingly done, and they were drawn and tendered. Three of those jurors upon their oaths stated, that they *had not* formed and expressed an opinion relative to the guilt or innocence of the prisoner at the bar, but they were nevertheless, on motion of the solicitor for the state, but against the prisoner's consent, set aside until the whole number then in the box were drawn and tendered. They were then called back, and two of them were challenged by the state, and one by the prisoner. Three other jurors swore that they *had* formed and expressed an opinion; when the judge inquired further of them whether they thought that the opinion was so fixed as to influence them any way in making up a verdict? they answered that they thought not, but that they could pass impartially on the case after hearing the evidence. They were then tendered, and challenged by the prisoner for cause; which was overruled; and the prisoner then challenged them peremptorily. The prisoner had challenged thirty-two jurors without cause, and the three as above, making in all thirty-five; and there being but eleven accepted, another was tendered, and the prisoner challenged him peremptorily; but the challenge was refused, and the juror sworn.

On the trial, a witness for the state, by the name of Matthews, testified, that he went to the store of one Brown, to see a man by the name of Armstrong, about some barrels: that the deceased was at work at the same place: that whilst there, the prisoner and Armstrong quarreled, and caught hold of each other, and were separated by witness: that the deceased said it was useless for prisoner to be making a parade, and that he was a better man than the prisoner: that the deceased was at work at the time, and laughed, and (198) the prisoner did not seem to regard him, but was in a passion with Armstrong; and, seizing a swingletree, struck Armstrong, and knocked him down: that witness took the swingletree from him: when he picked up a piece of wood,

and swore he would kill Armstrong: that witness took hold of the stick of wood with one hand, and the prisoner with the other, at which time Armstrong was about getting up: that he then saw the deceased leave his work, about thirty feet distance from them, and come briskly toward them, having nothing in his hand, saying nothing, and showing no anger, or disposition to fight: that on the deceased getting within a few yards of them, the prisoner let go the stick of wood, run his hand quickly into his pocket, and without having had time to open a knife, made at the deceased, and gave him a thrust; when the witness seeing the blood, said, "You have killed the man;" to which the prisoner replied—"By God, I have done what I wanted to do:" that the deceased was stabbed in the thigh, and died in a few moments; when the witness arrested the prisoner, who said, if they would give him a chance of making another lick and stroke with his knife, they might then hang him:—and that these events all occurred in quick succession after each other.

Wiliam Izzle, another witness, swore, that he was at Brown's: that the prisoner and Armstrong were in confusion in the store, when Brown ordered them out: that the prisoner, on going out into the yard, drew his knife, swore he was not to be put upon, and called on the persons present to bear witness that he put his knife open into his pocket: that Armstrong caught the prisoner by the collar of his coat, and swore that he could whip him: that the deceased did the same, but no blows then ensued: that the prisoner then got into a good humor, and went into the store and treated; when he and Armstrong again began to quarrel, and Brown ordered the prisoner out: that he went out and took up a swingletree, and on Armstrong's coming near him, knocked him down; when Matthews took the swingle-tree from him: that prisoner then
(199) picked up a large stick, and on Armstrong's saying something offensive, was going to strike him, when Matthews took hold of the stick: that witness then saw the deceased running towards the parties, until he got within four or five steps, and that Armstrong was then advancing towards the prisoner: that witness did not see the blow, but on looking round, saw the deceased standing, and his thigh bleeding: that he heard the deceased say, as he came up, "You can't serve me so:" that the deceased died in a few minutes;

and that the deceased and Armstrong were brothers-in-law.

His Honor, after explaining to the jury what murder was, and what provocation would reduce that crime to manslaughter, charged, that if two persons were engaged in a fight, and a third came up, and took part in the fight, and was killed, it would be but manslaughter; but such interfering person must either take part for one of the parties engaged, or encourage him, or act so as to induce the other party to believe that he was about to take part against him; otherwise, if killed by such party, though in a passion, it would be murder. If Armstrong had not touched the prisoner, or had touched him in anger, but they had become friends; or the prisoner had had time to cool, and had got into a good humour; or if there was no mutual combat between Armstrong and the prisoner, and the deceased came up as the friend of Armstrong, not having taken any part, and the prisoner stabbed him, it would not constitute a legal provocation. But it was for the jury to decide, whether Armstrong and the prisoner were fighting; and if so, whether, at the time the deceased came up, from what had before taken place, and from what he then said or did, the prisoner had sufficient grounds to believe, that the object of the deceased was to take part against him; for if so, it would mitigate his case to manslaughter; but otherwise it would be a case of murder. The jury returned a verdict of guilty; and the counsel for the defendant moved for a new trial, upon the grounds, that the court had erred, 1st. In refusing to permit the names of the tales jurors to be put into the box with those of the original venire. 2dly. In permitting the jurors to be set aside, on the motion (200) of the solicitor for the state, until the panel had gone through. 3dly. In disallowing, the prisoner's challenges for cause to the jurors who swore that they had formed and expressed an opinion relative to the prisoner's guilt or innocence. And 4thly. In giving an erroneous instruction in the charge to the jury. The motion for a new trial was disallowed, and sentence of death passed on the prisoner; upon which he appealed.

Badger and *W. H. Haywood,* for the prisoner.
The Attorney-General, for the state.

STATE *v.* BENTON.

GASTON, Judge: The prisoner was convicted of murder in the Superior Court of Sampson; and from the judgment there rendered against him, has appealed to this court. He assigns for error, certain irregularities of proceeding, in regard to the forming of a jury; the overruling of valid challenges, taken by him to jurors; and the misdirection of the presiding judge, in his charge to the jury. It was our duty to consider of these alleged errors, with the attention due to the immense stake which the prisoner has in the result of our deliberations, and to the importance of all questions affecting the regularity and purity of the trial by jury. This duty has been performed; and I am directed by my brethren to declare the opinion to which our deliberations have conducted us. The first irregularity objected by the prisoner, is as to the mode pursued in the drawing of the jury. It appears upon the record, that when the jury was about to be formed, there were in attendance seventeen jurymen of the original venire, and thirty talesmen. The prisoner required that the names of all the jurors, as well the tales as the original, should be deposited in the box together; but the court directed that those of the original venire should be first deposited and drawn; and that the tales should not be resorted to, unless a full jury could not be constituted without them. The prisoner's counsel has submitted this objection to us without argument. We have not, however, regarded it as waived, but have attentively examined it, and are satisfied that it cannot be supported. The mode of proceeding, observed in this case, we are warranted by our own experience
(201) and observation in saying, is that which has been generally, if not universally observed in this state for many years back, in the trial of capital offences. It certainly was pursued in *State v. Lamon,* 10 N. C., 175, where after the jurors of the original panel were either challenged or accepted, the prisoner tendered his challenge to the array of the tales. It is not necessary to inquire whether a departure from it would be error, but we are convinced that its observance is not only not liable to objection, but is most in accordance with our statutory provisions on the subject of juries. Our laws provide, that the justices of each county court shall appoint a number of freeholders, not less than thirty, nor more than thirty-six, to serve as jurors at the ensuing term of

the Superior Court of the county; that these freeholders, so appointed, shall be summoned by the sheriff; that of those returned as summoned, the first eighteen who may be drawn, shall constitute the grand jury, and "the residue of the names in the box, shall be the names of those who shall serve as petit jurors for the said court." They further provide, "that if any of the county courts shall fail or neglect to nominate freeholders, to serve as jurors, as aforesaid, or the persons so nominated shall fail to attend, it shall be lawful for such Superior Court to order the sheriff to summon other freeholders of the bystanders, to serve as jurors; and the persons so summoned shall be held and deemed lawful jurors; provided that such bystanders who shall be so summoned, shall and may be every day discharged; and the succeeding day, and so from day to day, during the continuance of the court, the sheriff shall summon of the bystanders *so many as may be necessary.*" It is apparent, then, that upon the petit jurors of the original venire, is imposed the general duty of trying all the issues, as well in criminal, as in civil causes, that may be submitted for trial during the term; and that the bystanders are to be called in to the performance of this duty, only upon a deficiency of the original panel, or where a necessity for resorting to bystanders shall occur.

Although the case before us does not *demand* an opinion, whether the same mode of proceeding should be followed, when a special writ of *venire facias* should have (202) been issued, as provided by the act of 1830, c. 27, yet as it is a matter of great public expediency, that an uniform practice should be observed throughout the state; and, as in the investigation of the present case, our attention has been drawn to the provisions of that act, we shall avail ourselves of the opportunity, to make known our views upon this question also. We consider the act of 1830, as owing its existence to the case of *Lamon,* already referred to. In that case, from an apprehension of great difficulties in procuring a sufficient number of jurors, free from exception, the presiding judge had issued an order to the sheriff of the county, antecedently to the day of trial, commanding him to summon seventy-five additional jurors. These attended, and after the original panel had been exhausted, were called, and

appeared as talesman, when the prisoner challenged the array of talesmen—1st, because the order issued was not to summon *bystanders;* 2ndly, because the order was issued on a day antecedently to that of the trial, and 3rdly, because it was issued for an excessive number of jurors. The challenge was disallowed, the prisoner was convicted, and then he appealed to this court. It was here held that the challenge was rightfully overruled. Among other reasons for this decision, the court stated, that as the persons summoned by the sheriff attended, the calling of them into court when so attending, was a sufficient summons of them as bystanders—but that "whether the court could have compelled their attendance under the special venire, was another consideration." The preamble to this act, recites the very doubt so expressed, and the expediency and necessity that the Superior Courts should have power by special writs of *venire facias* to compel the attendance of a sufficient number of jurors on the trial of a person charged with a capital offence, and for that purpose the act proceeds to enact that whenever a judge of the Superior Court, shall deem it necessary to a fair and impartial trial of any person charged with a capital offence, he may issue to the sheriff of the county in which such court may be held, a special writ of *venire facias,* commanding him (203) to summon such number of the freeholders of said county, as the judge may deem sufficient to appear on a specified day of the term as jurors of said court; and that the jurors so summoned shall attend from day to day, until discharged by the court, under the same rules, regulations, and penalties, as are prescribed by law for other jurors. There is nothing in the act which removes or interferes with the general duty incumbent on the jurors of the original venire. The object of the special venire is to provide auxiliaries in the performance of this duty, in a case of anticipated necessity; and it seems to us it will be construed most consistently with its object, by making use of the jurors thus specially summoned only in the event that their aid shall be actually needed. Though designated as "jurors of said court," and bound to attend throughout the term, unless sooner discharged, they are so far in the nature of tales jurors as being provided to supply a deficiency of the original panel.

Another alleged irregularity in the forming of the jury

is insisted on by the counsel for the prisoner. Three of the jurors of the original panel on being drawn and tendered, were, on motion of the solicitor for the state, and after objection from the prisoner, set aside until the whole number were drawn and tendered; and then these three jurors were called back, and two of them challenged by the state, and one of them by the prisoner. Anciently in the country of our ancestors, the king might challenge peremptorily, as many as he thought fit of any jury returned to try any cause in which he was a party, on the mere suggestion that those challenged were not good for the king; but by the statute 33, Edward I, commonly called an ordinance for inquests, it was enacted, that "notwithstanding it be alleged by them that sue for the king that the jurors of these inquests, or some of them, be not indifferent for the king, yet such inquest shall *not remain untaken* for that cause; but if they that sue for the king, will challenge any of those jurors, they shall assign of their challenge a cause certain; and the truth of the said challenge shall be inquired of according to the course of the court." Upon this statute a construction was put and settled, that although the king thenceforth could not challenge any jurors with- (204) out cause, yet if he challenge a juror before a panel is perused, he need not show any cause of his challenge till the whole panel be gone through, and it appear that there will not be a full jury without the person so challenged; and that if the defendant, in order to oblige the king to show cause, presently challenge all the others of the panel *"touts per availe,"* the defendant shall be first put to show all his causes of challenge before the king need to show any. In consequence of this construction, it became an established usage on the prayer of the king's counsel to direct a juror to stand aside until the panel be gone through; and this usage has also prevailed in the courts of this state. In the case of the *State v. Arthur*, 13 N. C., 217, it was recognized as a legitimate practice. By an act of our legislature passed in 1827, c. 10, it is enacted, that in all criminal cases of a capital nature, the prosecuting officer in behalf of the state shall have the right of challenging four jurors peremptorily, provided that he make his election to challenge before the juror is tendered to the prisoner. It is admitted by the prisoner's counsel that the concession of this privilege of peremptory challenges does not

take away the right of the prosecuting officer to challenge for cause; nor the right to defer showing the cause of challenge until it can be seen whether a full jury may not be had without the person challenged. This admission is properly made, for whatever was the origin of the usage before referred to, it has been as uniformly observed since the act as before, and *Arthur's case,* in which the legality of the practice was distinctly recognized, occurred after the passing of the act. But it is insisted, that when a juror is set aside on the prayer of the prosecuting officer, he is *challenged* by the state, and if good cause of challenge be not shown when the proper time arrives for assigning cause, such challenge must be regarded as a challenge without cause—a peremptory challenge. In support of this position it is contended that the prisoner may be subjected to inconvenience, unless the exception so taken and not supported, be considered a peremptory challenge—

(205) that the prisoner might have admitted a valid exception against the challenged juror, and on such admission the juror would have been discharged from the panel; but if the state can waive the exception, then there may be tendered to the prisoner as a juror, one really exceptionable, but against whom he may be unable to establish a sufficient cause of challenge; and thus the prisoner may be driven to the alternative of accepting one whom he does not like, or of throwing away a peremptory challenge. Upon full consideration of this alleged irregularity, the court is of opinion that the allegation is not well founded. We agree with the prisoner's counsel, that, when on the prayer of the prosecuting officer, a juror is set aside until the close of the panel, this must be understood as a challenge on the part of the state, for cause then taken, but a deferring to show the cause until the panel be gone through. In the regular order of proceedings, challenges for cause precede peremptory challenges; and when the former have been taken and disallowed, the latter may or may not be taken, at the option of him who has the right of absolute exception. One of the reasons assigned for allowing peremptory challenges to the accused, is, that upon challenges for cause shown, if the reason assigned prove insufficient for setting aside the juror, perhaps the bare questioning of his indifference may sometimes provoke a resentment, and to prevent all bad consequences from this,

the prisoner is still at liberty *if he pleases* peremptorily to set him aside. When the legislature, for what they deemed sufficient reason, conferred on the prosecuting officer the privilege of making a limited number of peremptory challenges, in addition to the pre-existing right of challenging for cause, they imposed no other restriction on the exercise of this privilege, than that it should be used, if used, before the prisoner should be called on to accept or reject the juror so peremptorily challenged. As a challenge for cause, unsustained when taken by the accused, cannot be converted into a peremptory challenge against his will, we do not see how, or why, when taken on the part of the state, it shall have such operation against the will of the prosecuting officer.

The reason of possible inconvenience to the prisoner, urged by his counsel, seems to us not to have the force attributed to it. What was there in the course of the pro- (206) ceeding that put it out of his power to admit that there was good cause of exception to the jurors, who were challenged for cause by the state? If he did not choose to make the admission, although he himself desired to get rid of these jurors, but speculated in the inability of the state to show a valid exception, and the probability of the state then resorting to a peremptory challenge, in all fairness he must abide by the consequences of that speculation. The legal rights of the state are not to be abridged, nor his increased, because of the result. It may not be amiss to remark, that the practice of permitting the prosecuting officer to defer showing his cause of challenge to the excepted jurymen, until the panel be gone through, must be exercised under the supervision of the court, who will restrain it if applied to an unreasonable number. On the trial of Horne Tooke for treason, as many as seven out of a panel of more than two hundred were thus removed to the end of the panel; and this was not deemed an unreasonable number; though in consequence of the very many persons excused, it was, in the end, likely to produce a serious inconvenience to the prisoner, which was only prevented by the honourable conduct of the attorney general. The third error assigned by the prisoner, the overruling of his challenges, is that on which his counsel mainly relies, for a reversal of the judgment—and which in his argument, he has ably and earnestly pressed upon us. The disallowance of a legal chal-

lenge, whereby the party taking the exception is compelled to accept as a juror, a person whom he had a right to reject, is a ground not properly for a new trial, but for a *venire de novo*. It is the denial to him of the benefit of an imperative rule of law, which vitiates the verdict, and lays a good foundation for a writ of error. The challenge ought to be propounded in such a way as that it may be entered of record; and so that the opposite party may either deny the truth of the matter thereby alleged, or avoid the challenge by a counter-plea of new matter, or may demur to its sufficiency. *King v. Edmonds*, 4 Barn & Adol., 471; (6 Eng. C. Law, 493). If an (207) issue of fact arise upon the challenge, either because of a denial of the matter of exception, or because of a counter-plea, this issue according to the ancient practice, was determined by triers, but according to the modern usage it may be, at least by the assent of parties, and is most conveniently, tried by the court. When the facts are ascertained, either by the triers or the court, or are admitted by demurrer, the sufficiency of the cause of challenge is a pure question of law, to be adjusted by the court. When the record simply sets forth the matter alleged, as cause of challenge, and a disallowance of the challenge by the court, the truth of the matter so averred, is understood as admitted; and the decision of the court substantially the same as though a formal demurrer had been entered. This will appear, we think, from the form of the record set forth in 3 Woodson Lectures, 347, n. i., in the case of *Heskett v. Braddock*, reported 3 Bur., 1847. Our inquiry then distinctly is, whether the cause assigned for these challenges of the prisoner, be in law a good exception against the persons so challenged. We very much regret, that on matter of such moment, the record does not show with *precision*, the cause of challenge assigned. We collect from it with sufficient certainty, that the persons drawn as jurors, were severally examined on oath, whether they had formed and expressed an opinion. It then states, that three jurymen who were drawn, answered to this interrogatory, that they had formed and expressed an opinion; whereupon "the judge *further* inquired, if they thought the opinion thus expressed, was so fixed as to influence them in any way in making up their verdict?" that they answered "that they thought not; but that they could pass impartially on the case,

after hearing the evidence;" that thereupon "on being tendered, the prisoner challenged them *for cause,* which was overruled; and he then challenged them peremptorily." The case further states, that the prisoner challenged thirty-two jurors peremptorily, besides the three above-mentioned; and afterwards on a juror's being tendered, claimed the right to challenge him also without cause, which was refused by the court, because he had already challenged thirty-five (208) peremptorily; and thereupon the person so last challenged, was sworn on the jury. In the interpretation of this record, we can affix to it no meaning of which it is not fairly susceptible, but whenever it will reasonably admit of more than one construction, we hold ourselves justified in adopting that which is most favourable to the prisoner.

A question has been very much discussed at the bar, whether jurymen can be called upon to testify as to preconceived opinions expressed by them on the subject-matter to be tried, or must the objection to their indifferency, founded upon such declared opinions, be proved by extrinsic evidence? The case before us may, we think, be determined without deciding this question; because we hold that however this may be, the fact of the declaration appears upon the record. But we will not pass over the question, for it is certainly time that it should, if possible, be put to rest. It appears from *Norris's case,* 2 N. C., 429, which occurred in 1796, that the legality of this mode of examination was then unsettled. The two judges who presided on that trial, differed in opinion respecting it. But for the last fifteen or twenty years, it has been without dispute, assumed to be legal, and practised upon accordingly. We should have vast difficulty now, after this acquiescence of the bench, and the bar, and the community in its legality, to pronounce against it; and could not do so without a very clear conviction that it is forbidden by the law. In criminal cases, perhaps (for it is by no means certain) the weight of English authority before our revolution, may have been against it. See *Cook's case,* 1 Salk., 153; 13 State Trials, 334. From a recent decision in the Court of King's Bench, *(Edmond's case,* before referred to) it appears now to be settled, that it is not to be allowed in criminal cases; but the reasons of that decision are not so satisfactory, as to convince us of its correctness.

The reasons assigned, are, 1st, For that expressions of opinion used by a juryman are not a cause of challenge, unless they are to be referred to something of personal ill-will towards the party against whom the opinion has been
(209) expressed; and, 2dly, That it is a very dishonourable thing, for a man to express ill-will towards a person accused of a crime, in regard to the matter of his accusation; and the juryman is not to be sworn to prove his own dishonour. The position, that a juryman may not be challenged because of an opinion made up and declared on the very matter to be tried, unless such declaration can be referred to personal ill-will, seems to us not well founded. It is certainly a good cause of challenge, that he hath rendered a former verdict against the party challenging, for the same matter, although it be reversed by writ of error, or after verdict the judgment hath been arrested. Co. Lit., 157, a. So, if the juryman hath given a former verdict upon the *same matter,* though between *other parties.* Co. Lit., *ut supra.* So it is a valid exception at common law, that he hath been one of the grand jury, who found the bill; for the statute of 25 Edw. 3d, ch. 3, is but declaratory, and in affirmance of the common law against certain irregular practices which had recently prevailed. 2 Haw., ch. 43, sect. 27; 2 Reeve His. Common Law, 459, 460. So it is, if he has declared his opinion against the party, as an arbitrator. Bacon, Juries, E. 5, and E. 12. This we find in a case from the Year Book, 49 Edw. III, fo. 1, cited by the Chief Justice in *Edmond's Case,* "it appeared, that some of the jurors were challenged, *for that they had declared for the one party or the other before hand,* or given their verdict beforehand; and some, for that they were of counsel with the one party or the other, and of their fees; and the persons themselves were sworn to speak the truth when the challenge did not go to their reproof or shame; but those who were challenged for that they had *taken* of the party, or procured without taking, were not sworn on the *voir dire* to give evidence to the triers." It seems then, indisputable, that the indifferency which the law requires is not a mere exemption from personal partiality or personal malevolence; for what presumption of such partiality or malevolence can be raised from the mere fact that the juryman hath been one of the grand jury, who found the bill of indictment,

or of a jury who had given a former verdict on the same matter, or was an arbitrator who had awarded (210) thereon; or a person who had previously declared the rights thereof? The fair presumption in all such cases is, that the former finding or declaration was according to honest belief. The indifferency required by the law must be one of the judgment, as well as of the passions, such as enables the trier to find the facts truly, according to the evidence; therefore a mind not thus indifferent, but inclined against one or the other of the parties to the issue, whether from personal dislike, or a previous determination on the controversy, has to him an unfavourable disposition, or in the language of the olden times, an "ill-will." Thus Britton, speaking of the prisoner being permitted to challenge a juror, be cause he was one of the indictors, gives as a reason, because "there was a presumption that all who indicted him still bore the same *ill-will* against him." Nor is this conclusion removed by recurring to the ancient authorities referred to in *Edmond's Case,* in which it was holden, that if a juryman hath said that he will find for the one party, or hath declared his opinion that another is guilty, and hath made such declarations from the knowledge he has of the matter, he is nevertheless in law indifferent. Knowledge is to be distinguished from opinion. Anciently, all facts in issue were primarily referred to the personal knowledge of the inquest. Witnesses were called in, but to supply the want of this knowledge. Jurors, notwithstanding the testimony of witnesses, were at liberty to find the facts upon their own knowledge. So far, therefore, from it being the matter of exception to a juryman, that he had declared a fact from his personal knowledge of it, he was esteemed because of this knowledge but the better qualified for being one of the inquest. Knowing the truth, and determined to affirm it, he was indifferent to all but the truth; and it was *this* which was demanded at his hands. But it was not so of one who had prejudicated the matter upon the information of others: he was liable to the influence of this prejudication, however erroneous it might be; would enter on the trial with the unfavorable disposition to one of the parties to the issues, thereby created; might find the verdict required of him, not from actual knowledge (211) nor from the proofs, but in part, at least, from the bias

of opinion; and therefore was properly considered as not being one of those, "by whom," in the language of the venire, "the truth might best be known."

If we are correct in this understanding of what the law means by indifference, it will follow, that a juror may be examined as to opinions honestly formed and honestly expressed, manifesting a bias of judgment not referable to personal partiality or malevolence. There are unquestionably occasions upon which *such* opinions may be so made up and declared. Independently of those already mentioned, many must occur in the discharge of public duties, or the duties of friendship, and many even in ordinary social intercourse, to justify, and almost compel the avowal of such opinions, without any personal ill-will, or a desire to create prejudice, or an expectation that he who makes them known, or those to whom they are communicated, will have to sit in judgment upon the subject to which they refer. No doubt they are too often rashly formed, and improvidently expressed, but even in these cases, the error is in general attributable rather to the infirmity of human nature, than to wickedness of purpose. If, in fact, they have been, without necessity, made up and declared by one who has been called, or expects to be called, to aid in a judicial investigation of the subject; and still more, if they have been disseminated, with a view to influence the judgment of others, and to affect the result of such investigation; then, indeed, they do involve dishonor and guilt; then they have the tendency to poison the purity of jury trial at the fountain-head, merit the reprobation of every friend to the even-handed administration of justice, and may very properly be visited with severe legal penalties. No juryman ought to be required to testify against himself as to such misconduct. If the question proposed cannot be answered without exposing him to the peril of this disgrace and punishment, the law protects him, and he should be apprized that the law protects him, from making any answer thereto. But unless they will have this effect, the party challenging has a
(212) right to the truth, the means of ascertaining it, and a resort to any witnesses by whom it can be shown. To give the right to challenge against a juryman, because of his prejudication of the case, and to forbid an examination of the juryman, as to the fact of such prejudication, is, in a great

majority of cases, to grant it in terms, and deny it in effect. All technical objections which go to shut out the truth, when justice requires it to be shown, are to be received with great strictness.

The next question presented in the course of this inquiry is, whether the forming and expressing of an opinion, constitutes a good cause of challenge to a juryman; and if so, whether it be a principal cause of challenge, or one to the favour only. Challenges for unindifferency are all in one sense because of favour, *"propter affectum,"* but they are distinguished by the law into two sorts; either those working a *principal challenge* for favour, or those *inducing* or *concluding* to the favour. These two sorts sometimes approach each other so closely, that it is difficult to draw the line between them; but in contemplation of law, a distinct line of discrimination does exist. The former are said to be, because of express favour, or favour apparent, and embrace all those matters, which, being shown or admitted, warrant the conclusion of *law*, without regard to the actual fact, that the person challenged is not indifferent. Thus if the person challenged, be of kindred to one of the parties, the law presumeth that he doth favour his kinsman. So if he hath before given a verdict on the same matter for one of the parties, or hath been an arbitrator thereon, at the nomination of one of the parties, and treated with him thereof; or if he be his servant, or his tenant, liable to his distress, the law itself *sees* unindifferency, and requires no triers to find it. Challenges to the favour, are where the matter shown, do not, *per se,* demonstrate unindifference, and therefore warrant it as a judgment of the law, but only excite a suspicion thereof, and leave it as a matter of *fact,* to be found or not found, by the triers, upon the evidence. They are so called, (we presume) because of the form in which they appear, when specially drawn up. They always conclude with the averment, that the person challenged is favourable, *"et essint favour-* (213) *able."* Rolle's Abr. Trial, 649, pl. 7; Trials *per pais,* 160, *et seq.* The causes of the latter are so numerous, that they have been termed by *Lord Coke* "infinite." It seemeth to us, that an opinion, fully made up and expressed against either of the parties, on the subject-matter of the issue to be tried, whether in civil or criminal cases, is a good cause of

principal challenge; but that an opinion imperfectly formed, or an opinion merely hypothetical, that is to say, founded on the supposition that facts are as they have been represented or assumed to be, do not constitute a cause of principal challenge, although they may be urged by way of challenge to the favour, which is to be allowed or disallowed, as the triers may find the *fact* of favour or indifferency. In coming to the former part of this conclusion, we rely upon elementary principles; on the most respectable adjudications of the courts of the United States, and of the several states of the union; and on the usages of our own Superior Courts, recognized heretofore in this court. In considering the question whether a juryman may be examined as to his expressed opinions, we have already stated the elementary principles, which lead also to the belief, that a prejudication of the matter in controversy, constitutes a valid exception, unquestionably it does constitute such an exception, when it has been declared on oath; as on a former trial of the same cause, or of a cause involving the same matter, or by a grand juror finding the bill of indictment. It is acknowledged also as such, in many cases, when not declared upon oath, but in the performance of a social duty; as for instance in the award of an arbitrator, indifferently chosen by the parties.

The declaration on oath is a more solemn evidence of the care with which an opinion has been made up, and of the settled character of that opinion, than a declaration not upon oath; but after all, it is the fixedness of the opinion, and not the manner of its declaration, which constitutes the exception; and it by no means follows, that the strength or obstinacy of an opinion depends on the caution with which it has been formed. On the trial of Aaron Burr, it appears, that (214) by consent of the prosecuting officers on the part of the government, and of the prisoner and his counsel, all exceptions to the members of the jury, whether in the nature of principal challenges, or challenges to the favour, were indiscriminately submitted to the judgment of the court; and it is not always certain when they were allowed as exceptions of the first or of the second kind: but this distinction seems to be recognized by the great judge who presided on that trial, that one who has made up his mind upon rumour, and so declared it, that the prisoner was guilty, is incompetent

to decide upon the testimony in the case; while he on whose mind unfavourable impressions have been made by rumour, and has made known these impressions, may be received, or not, accordingly as those impressions were strong or weak, permanent or fleeting, and do or do not leave his mind free to decide upon the testimony. The deliberate opinion of guilt once declared, was deemed of itself a valid exception; and an opinion less determined became an exception or not, according to the effect produced by it and remaining at the time of trial. In the answer of *Judge Chase* to the articles of impeachment against him, he lays down as a rule, that the law presumes indifferency of every juryman, until the contrary appears; and that this presumption is not removed by general expressions of opinion as to the criminality of the act of which the party is accused; but he distinctly admits, that this presumption is repelled by the declaration of an opinion, that the party is guilty of the offence charged. In every state of the union, so far as we are informed, the declaration of a settled opinion against a prisoner is deemed a principal cause of challenge. We know that such is the law of Virginia. It appears to be the law also of South Carolina. *State v. Baldwin*, 1 Cons., 289. It is the settled law of Connecticut. 2 Swift's Sys., 232. It has been authoritatively decided to be the law of New York. *People v. Vermilyea*, 6 Cow., 555; and 7 *Ibid.*, 109. It has been acted upon as settled law, by the Superior Courts of our state, for the last twenty years, and is distinctly recognized as such in *Lamon's Case*, before referred to. The language of the late *Chief Justice Henderson* in that case is, "It is undoubtedly good cause (215) of challenge to one offered as a traverse juror, that he was one of the jurors who composed the coroner's inquest, or of the grand jury which found the bill, for he hath both formed and expressed an opinion on the subject." But it also seemeth to us, that those opinions, if they can be termed such which have not been fully made up, or which do not amount to belief, but only to impressions in regard to the matter in controversy, do not constitute a cause of principal challenge. The law indeed requires, that the juryman should stand indifferent, as he stands unsworn, and therefore excludes from the jury-box as far as the infirmity of human nature and the imperfections of human institutions will permit, every

bias, partiality or prejudice, which may prevent the verdict from being a finding of the truth upon the proofs. It knows that honest but weak men may confidently believe that they are governed by the evidence, when they are misled by their prepossessions. Aware of the difficulty with which the understanding emancipates itself from the thraldom of opinions once definitively formed and declared, it pronounces those unfit for the free examination of a controverted matter, who have thus prejudged it. But the law would do violence to the deductions which the observation and experience of every day furnish, if it held that every impression inducing assent for the moment to the existence of a supposed fact, disqualified the understanding from entering upon a grave inquiry into the actual existence of the fact with perfect freedom. Impressions short of full belief, opinions not definitively made up, or depending upon the supposition that matters shall turn out as they have been represented—all of these may throw impediments in the way of impartial deliberation, and furnish cause to suspect that the juror may lean more favourably to the one than to the other party in the issue, and therefore in all these cases the law, by means of a challenge *to the favour* authorizes an inquiry, whether in truth they have produced this bias.

It is denied on the part of the state, that the opinion of the challenged juryman was ever a fixed opinion. Assu-
(216) redly there is some room for doubt on this point. The doubt is increased by our experience of what frequently occurs upon investigations like that set forth on this record. We know that jurymen often seek to excuse themselves upon the ground of their having expressed an opinion, when upon prosecuting the inquiry, it turns out, that they had not made up any fixed opinion.

The answer of the challenged jurymen to the further inquiry proposed by the court, renders it quite probable that such was the case here. If it were so, then there was at least but a cause of challenge to the favour, and the judge, on becoming satisfied that what the persons challenged called an opinion, was not such in the legal meaning, and had left no unfavorable bias on their minds, was perfectly correct in overruling the challenge. Much as we may suspect this to be the fact, we do not feel ourselves justified in acting upon it

judicially. We can know of what occurred on the trial only by what the record states. We there see the opinion described as one *formed* and expressed, and without further explanation we must understand it to have been fully formed and gravely expressed. The subsequent explanation is not inconsistent with this understanding. It shows only that the jurymen challenged believed that this opinion, however fixed it might have been when declared, was not then so fixed as to prevent them from finding a verdict according to the evidence. This belief did not remove the exception. From a decided opinion declared, the law infers a bias, and the belief of the person so biased, that he can rise superior to its influence, does not repel the legal inference. Nor ought it; for it not unfrequently happens that those who are most confident in the ability of their understanding, to triumph over this obstacle in the way of its free exercise and of the ascertainment of truth, owe this confidence to their ignorance of the stubbornness of prejudice, and may be the least qualified for the discharge of this, to all persons and at all times, perilous undertaking. The distinction which we make is substantially the same with that taken in the case of the *Commonwealth v. Ostander,* lately determined in the general court of Virginia; a case which has been referred to by the (217) counsel on both sides. It was there held, that he who has formed and expressed a decided opinion as to the guilt of a prisoner, is an incompetent juror, but he who has formed a hypothetical opinion only, if he can decide upon the evidence without being influenced by this impression, is an indifferent juror. It is in accordance too, with several cases decided in the Supreme Court of New York, which will be found ably commented upon in the case of *Vermilyea* heretofore referred to. But it is objected on the part of the state, that be the opinion of the challenged juryman absolute or hypothetical, fixed or indeterminate, there is nothing on the record to show *what that opinion was.* After the most deliberate consideration we are obliged to say, that this objection is insuperable. Before we can reverse the judgment because of error in overruling the challenges, it must appear that they were taken for sufficient cause. As no cause is *distinctly* assigned, by no fair intendment can we assume that any others were understood to be assigned, or were in fact assigned, than such as

the record shows was known to the court who overruled the challenges. We do collect from the record, that the persons challenged had formed and expressed an opinion on the matter there to be tried—the guilt or innocence of the prisoner—but we cannot collect whether that opinion affirmed his guilt or his innocence, for the record furnishes *no* information that any inquiry was made into the character of that opinion as favourable to the state or to the prisoner.

Several answers have been made to this objection, but none which are satisfactory. It is in the first place insisted, that the right of exception to a juryman because of unindifferency, is not confined to the party against whom he is unfavourable. It is argued that every man has a right to an impartial jury. He may desire not merely an acquittal, but an acquittal which shall remove every taint from his name; and if he pleases, may object to the juryman tendered because he is favourable to *him;* and in illustration of the position, is cited the well known case, that if a party challenge a juror because he is related to the other
(218) party, the latter cannot counterplead that he is related also, or more nearly to the challenger. This position seems to us clearly untenable. It is upheld by no analogous principle, warranted by no adjudged case, and opposed by positive authority. The object of the law is, indeed, an impartial trial, but it secures this object by definite means, wisely devised to effect it. It gives to each party the privilege of excepting to the array of the jury, if favourably made, and to every individual juryman who may be favourable to the other party. Such is the *right* of each party; and by the free and mutual exercise of this right, the end is *practically* accomplished. It takes no cognizance of points and principles of honour, but is solely intent on administering justice, ascertaining the truth, and applying to it when ascertained, its known rules. As it sets aside jurors who are under a bias of partiality to find untruly, so it excludes witnesses who are under the bias of interest to testify untruly. But if the party against whom the witness has this interest will not except to his testimony, the witness must be received as competent. And if he to whom the partiality of the juror is opposed, will not except to him because of this partiality, the juror must be received as indifferent. *All* the precedents

of challenges *propter affectum,* either to the array or to the polls, are for matter which either manifests or argues a prejudice against the party challenging. The practice where the sheriff is of kin to one of the parties, and therefore it is apprehended that a challenge may be taken to the array, if made by him, intimates the true principles of the law respectin such challenges. If the sheriff be of kin to the plaintiff, *in order to prevent delay,* the plaintiff may allege the same, and pray process to the coroners, which he cannot have unless the defendant will confess the same; but if the defendant will not confess it, then the venire must issue to the sheriff, and the defendant shall not then be permitted to challenge for that cause; but on the part of the defendant, any such matter shall not be alleged, and process prayed to the coroners, because he can challenge the jury for that cause, and can therefore be at no prejudice. Co. Litt., 158. See also *Kynaston v. Mayor of Shovesbury,* Andrews, 85—104. (219) It is also illustrated, we think, in the case of *Leader v. Samwell,* Cro. Jas., 551. There in an action of trespass for the taking of the plaintiff's beasts, and detaining them until a fine of ten pounds was paid, the defendant justified under an assessment of the fine for repairs made by the sheriff in his court. After a verdict for the plaintiff, the defendant moved an arrest of judgment, because it appeared of record, that the *venire facias* had been awarded to the sheriff; and it being a thing which concerned the sheriff and his interest, it ought not to have been awarded to him, but to the coroners; *"sed non allocatur;* for being awarded to the sheriff when he was party;" (meaning no doubt in interest) "and not to the coroner, that is no exception for the sheriff, it being done for his advantage and favour; but peradventure the plaintiff might well have taken the exception." An exception for unindifferency in legal parlance, always means *favour to the other party.* Thus the statute of 33 Edward I, already mentioned, speaks of challenges made on the part of the crown, "because the jurors of those inquests, or some of them, be not *indifferent for the king."* When a challenge *propter affectum* is made, the finding against it establishes only that he is not favourable to the other party, for *Lord Coke* lays it down, (Co. Lit., 158) that if one be challenged by one party, if after he be tried indifferent, it is time enough for the other party to challenge

him. Nor does the illustration urged on the part of the prisoner, conflict with these views. Any party has a perfect right to except—and it is in law a principal challenge, because of kindred between the juryman and the adverse party; and this right is not taken from him, because the other will not exercise a corresponding right of exception, which he has against the same person.

It is then argued on the part of the prisoner, that as the challenge was taken by him, and because of a prejudication of the matter in controversy, it must be presumed that such prejudication was against the prisoner. We are not authorized to make such a presumption. The overruling of the challenges has been considered by us, as on a demurrer (220) taken *ore tenus;* but a demurrer never admits any facts but those which are sufficiently pleaded. We have gone far in finding upon the record, cause of challenge assigned, that the persons tendered had expressed an opinion upon the matter to be tried; but we should travel wholly out of it to find what was the opinion so expressed. If the law presumed in favour of the challenge, we might assume the fact as the prisoner wishes us to intend. But the presumption of law is the other way—it presumes what was done, rightfully done, until the contrary is shown. We must then take the fact to be, that the prisoner claimed the right of exception, *not* because those challenged had prejudged the case against him, but simply because they had prejudged it. This will not do. We hold that a bias of the understanding, as well as an inclination of the affections, may give the parties a right of challenge; but in the one case as in the other, the right is *his* only against whom the leaning operates. It is therefore incumbent on him who challenges, to show its tendency to his prejudice. It was competent for the prisoner in this case, if he believed the fact warranted it, to assign for challenge, that the jurymen had determined the case against him; and if the fact were not admitted, to ascertain it by either an examination of the persons so challenged, or by the testimony of indifferent witnesses. And even then, if his suspicions turned out to be unfounded, he had yet the privilege of challenging them peremptorily. These were his legal rights and here he stands upon these rights. He could not claim to set aside a person tendered to him as a juror, because such

person had expressed an opinion on the case, and he *feared* that the opinion was against him. If he would *act* without further knowledge—he could only challenge peremptorily.

It is then finally argued by the prisoner's counsel, that the examination of the jurymen with respect to an expression of opinion, was made by the court before, and independently of any challenge taken by the prisoner: that it must have been made for the purpose of setting aside all who were liable to just exceptions upon an understanding express or implied, that both parties desired all such to be excluded: that the court erred in holding that the opinions expressed (221) by the three jurymen afterwards challenged, did not furnish a valid exception; and that this error appearing, it ought to be corrected by reversing the judgment. Neither will this ground avail the prisoner, and for this obvious reason, that the court forbearing to discharge a juror, to whom an exception has not been taken, if there be ascertained cause of challenge against him, *can* do no injury to either party. The privilege of exception is not in the slightest degree impaired thereby. If the court upon such previous examination, entertained a doubt on the subject of the juror's competency, it was the safer course to cause him to be tendered, in order that exception, if any, might be taken. As this is the first fit occasion which has been here presented, for considering of the practice which has become so common in capital cases, of administering to every juryman what is called the preliminary question, whether he has formed and expressed an opinion as to the guilt or innocence of the prisoner; and as it is very important that the nature of this examination, and the legal consequences of it, should be well understood, we have deemed it our duty to state the views which we take, and the opinions which we entertain, upon the subject. Every court has, as we apprehend, the power of its own motion, to cause to be withdrawn from the jury, those whom it believes not qualified to discharge the duties required from jurors. It *may*, therefore, set aside jurymen, because they do not stand indifferent for the state or the prisoner, without an exception being taken; but a necessity for the exercise of this power can scarcely be conceived, except when the prisoner is in effect, without counsel. As incidental to this power, it has also authority, either by an examination of the jurymen, or of

any other witnesses, to ascertain the matters of fact, so as to enable it to exercise this power discreetly. But when the court is thus acting upon its own motion, for its own satisfaction, it does not adjudicate between the parties. Neither can assign for error, that one of the panel has been withdrawn by order of the court, without adequate cause; and each has the perfect right of challenging for sufficient cause, those (222) whom the court may leave on the panel. It is also competent for every person who may be called upon to serve as a juror, to state any matter of exception or excuse which he may have with respect to performing the duty, and pray the court for his discharge. Upon the consideration of this prayer, the court can of course, examine the applicant upon oath; and at its discretion, may or may not discharge him. Neither party can assign for error, that discharge; and either may except to him, if not discharged; but except in the rare instances where the court deems it necessary of its own motion, to purify the panel—or where a juryman excepts to, or excuses himself—this examination of the jurors, as to their having formed and expressed an opinion, seems to us irregular, and out of place. The only regular way in which the validity of an exception to a juryman can be tried, is upon the challenge of one of the parties. The challenge made, and its cause assigned—as for example, that the person challenged has made up and declared an opinion, that the prisoner was guilty—the court then acts judicially upon it. If there be a dispute of fact, it may try the fact, unless one of the parties demands triers. Then testimony is regularly heard; and under the qualifications before stated, the jurymen challenged, may be themselves examined. Of the fact found either by the court or the triers, there is no review. If triers be appointed, and the court misdirect them in point of law, the alleged misdirection should be entered on the record—if on the fact found either by the court or by the triers, a judgment be rendered which is supposed to be erroneous; or if the court overrule the exception taken as on a demurrer, and the party challenging be dissatisfied therewith, he may pray that these matters be recorded; and they must be recorded. By pursuing this ancient and well defined mode of proceeding, every reasonable security is had for forming a proper inquest; and

for correcting errors that may have happened in endeavouring to form it.

The practice of indiscriminate inquiry into the indifferency of the jurors, before any exception taken, can only be sustained upon the ground of consent, to which consent it no doubt owes its origin. If the counsel on both (223) sides request that instead of the parties taking exceptions, and the court deciding upon them, the court will select from the panel such jurors as it may deem unexceptionable—the court can undertake the office, but it is not bound to do so. If it do undertake it, of course it must use the incidental means by examination of the jurors, or otherwise, to enable it to do right. We should think, however, that before asking of the court to assume this trouble and responsibility, there should be an explicit waiver on both sides, of all the challenges except peremptory challenges.

The exception which was taken below to the charge of the judge, has been here with great candor abandoned. It is certainly unfounded. The only objection which might perhaps be made to the charge, is one of a very different kind—for that a part of it, and a part of which the prisoner cannot complain, was superfluous. It instructs the jury, that if the deceased were killed, when in the act of taking, or apparently taking part in the common fight against the prisoner, the crime of the prisoner was but manslaughter. It may be questioned whether there was *any* evidence, relevant to raise the supposition of such a case; and no instruction should be given on a purely hypothetical statement. It is difficult indeed to conceive of a stronger and plainer case of murder than this appears to be on the testimony. The prisoner had knocked down with a swingletree a defenceless man; and on being deprived of this weapon, had seized a large stick of wood, with which he was about to repeat the blow. He was then engaged in a most wicked act, not unlikely to terminate in murder. It was the duty of every bystander to interpose, and stop this career of violence. The deceased at this moment came up towards the parties, when the prisoner instantly turned from the first contemplated victim of his vengeance, advanced, and without a word of warning, plunged a knife into him, and killed him. We can discover no provocation on the part of the deceased, to change the character which the

law impresses on the fatal deed, the character of wilful (224) murder.

The Court is of opinion, that there is no error in the judgment below. This decision must be certified to the Superior Court of Sampson, with instructions to proceed to sentence agreeably thereto, and to the laws of the state.

PER CURIAM. Judgment affirmed.

Cited: *State v. Morgan, post,* 356; *State v. Shaw,* 25 N. C., 534; *State v. Lytle,* 27 N. C., 60; *State v. Craton,* 28 N. C., 185; *State v. Ellington,* 29 N. C., 62; *State v. Collins,* 30 N. C., 411; *State v. Dove,* 32 N. C., 471; *State v. Langford,* 44 N. C., 443; *State v. Robbins,* 48 N. C., 255; *State v. Williams,* 51 N. C., 577; *State v. Bone,* 52 N. C., 122; *State v. Cockman,* 60 N. C., 488; *State v. Owen,* 61 N. C., 427; *State v. McCurry,* 63 N. C., 35; *State v. Shirley,* 64 N. C., 612; *State v. Mercer,* 67 N. C., 267; *State v. Collins,* 70 N. C., 243; *State v. Matthews,* 80 N. C., 419; *State v. Efler,* 85 N. C., 587; *State v. Jones,* 88 N. C., 679; *State v. Washington,* 90 N. C., 667; *State v. Hensley,* 94 N. C., 1029; *State v. Sloan,* 97 N. C., 502; *State v. Cole,* 132 N. C., 1083.

MEMORANDUM.

At the late Session of the General Assembly, *Frederick Nash, Esq.,* of the county of Orange, *John D. Toomer, Esq.,* of the county of Cumberland, *John L. Bailey, Esq.,* of the County of Pasquotank, and *Richmond M. Pearson, Esq.,* of the county of Davie, were elected judges of the Superior Courts of Law and Equity for this state; the three first, in the places of judges *Norwood, Strange,* and *Donnell,* resigned; and the last, to supply the office rendered necessary by the creation of an additional judicial Circuit.

JUNE TERM, 1837.

HENRY ADCOCK v. ALFRED FLEMING.

1. Where a contract binds one collaterally, and depends upon the default of another, notice of that default ought to be given, in order to charge the person secondarily liable, as in cases of guaranties and the like.

2. A guaranty of a note upon an assignment of it, is not an engagement to pay the debt of another, within the statute of frauds.

Assumpsit, originally commenced before a single magistrate. Plea, the *general issue*. Upon the trial at Chatham, on the last Circuit, before *Dick, J.*, a verdict was taken, subject to the opinion of the Court upon the following facts.

The defendant was indebted to the plaintiff by a bond, upon which sundry payments had been endorsed. Upon a calculation of the balance due, it was found to be twenty-five dollars; when the defendant offered to give the plaintiff two small promissory notes in lieu of the bond. This was declined by the plaintiff, unless the defendant would endorse them. The defendant then told the plaintiff to take the notes and collect them; and if he failed to do so, that he, the defendant, would pay him the amount of them. Upon this assurance, the plaintiff took the notes, and delivered (226) upon the defendant his bond. One of these notes had been given upon a gaming consideration; and the other was subject to a credit at the time it was transferred to the plaintiff; so that, after exercising due diligence in attempting to render them available, the plaintiff was able to realize only five dollars from them. This action was brought on the agreement above mentioned, made when the notes were transferred to the plaintiff, upon his surrender of the bond to the defendant. The plaintiff had never given the defendant notice of his failure to collect the notes, and of his reliance upon him to take them up.

It was contended by the defendant, First, that notice, by the plaintiff was indispensably necessary. Secondly, that the action being upon a guaranty, a single magistrate had no jurisdiction of it. Thirdly, that this was an agreement to pay the debt of another, and ought to be in writing.

The presiding judge being of opinion for the plaintiff, judg-

ment was entered accordingly; and the defendant appealed.

No counsel appeared for either party in this Court.

DANIEL, Judge: It seems to us that the two first questions raised in this case, have already been decided in this Court. First, Was the plaintiff bound to give the defendant notice of his failure to obtain payment on the notes placed in his hands, before he brought his suit? In *Grice v. Ricks,* 14 N. C., 64, the Court said, "It is a general rule of law, founded on sound reason, that when the liability of one party is not absolute and direct, but is upon a collateral obligation, dependent upon and arising from certain things to be done by the other party, and being peculiarly within his knowledge, he who is to take benefit by the engagement, must give the other notice of what has been done, and that he is held liable. From the nature of things, notice is part of the agreement, and the debt does not arise before notice. It is of the nature of a special request; and must be alleged in the declaration, and (227) proved." The same doctrine is sanctioned in *Sherrod v. Woodward,* 15 N. C., 360. As to the second question, in *O'Dwyer v. Cutler,* 12 N. C., 312, the Court decided, that a single magistrate has no jurisdiction of actions founded upon a guaranty, unless the plaintiff may disregard the guaranty, and declares on the original consideration. *Bell v. Ballance,* 12 N. C., 391. Thirdly, we think the debt sued for by the plaintiff, was not, nor ever had been, the debt of any other person but the defendant. In law, it would be discharged in case the amount of the collateral securities, placed in the hands of the plaintiff to collect and make satisfaction, was lost by the negligence of the plaintiff. This case is not within our statute of frauds. The plaintiff did not give notice of his failure to collect the notes before he brought suit. The Court being mistaken in the law, there must be a new trial.

PER CURIAM. Judgement reversed.

Cited: Wall v. Nelson, 28 N. C., 303; *Ashford v. Robinson,* 30 N. C., 116; *Nichols v. Bell,* 46 N. C., 33; *Cox v. Brown,* 51 N. C., 101.

JOHN HAMILTON v. MAY JERVIS.

1. A single justice has jurisdiction upon a valid engagement "to pay the sum of one hundred bushels of corn"; and the warrant is sufficient if it be "to answer, etc., of a plea of debt, the sum of," etc., as in the contract.

2. If a warrant state the parties, the sum demanded, and how due, it is sufficient.

This was an action commenced by a warrant before a single magistrate, in which the defendant was required "to answer the complaint of John Hamilton, in a plea of debt, the sum of one hundred bushels of corn."

The obligation declared on was as follows:

"On or before, &c., I promise to pay John Hamilton, the sum of one hundred bushels of good sound corn, at the place where," &c.

"MAY JERVIS. [L. S.]"

On the trial before *Pearson, J.*, at Yancey, on the last Circuit, the only questions were—First, Whether a single justice had jurisidiction of the cause? and if he had, (228) then, Secondly, Whether the form of action ought not to have been covenant? His Honor ruled the first question for the plaintiff, and the second against him; and he submitted to a nonsuit and appealed.

No counsel appeared for either party in this Court.

DANIEL, Judge: This case comes before us, by way of appeal from the judgment in the Superior Court of Yancey, upon a case there agreed. Two questions were raised. First, Did the justice of the peace have jurisdiction of the case? By the acts of assembly passed in 1794, (*Rev. c.*, 414) and 1803, (*Rev. c.*, 627) the justices of the peace have jurisdiction of demands "for specific articles," to the value of thirty pounds. The magistrate ascertains the market value at the time the specific articles should have been delivered, and that sum, with interest from that time, should be the judgment. We think the opinion of the judge was right on this point. The second question was, whether the warrant should not have been in *covenant*, and not in *debt*? The judge

thought, that the form of action should have been *covenant;* and he, on this ground, non-suited the plaintiff. The sixteenth section of the act of 1794, enacts, "that no attachment, *warrant* or other process, issued by a justice of the peace, shall be set aside for want of *form,* if the essential matters required are set forth in such process." It is not objected, that the essential matters of the plaintiff's demand are not sufficiently set forth in the warrant, so as to give the defendant every opportunity to make his defence, if he had any, but the objection is to the *form* of the action. In Magistrates' Courts, no declarations are filed by the plaintiffs; there is not that particularity required of specifying the action, as there is in courts of record. In this warrant, the parties, the sum demanded, and how due, are specified; and the second section of the act of 1794, requires only that these shall be stated. The essential matters are set forth, and then the warrant stating that it was a plea of *debt,* or a plea of *covenant,* would be nothing more, in our opinion, than form, which the (229) before recited section of the act of assembly declares shall not be a cause for setting it aside. We are of opinion, that the judgment of non-suit must be set aside, and judgment rendered for the plaintiff for forty-five dollars, and costs of suit.

PER CURIAM. Judgment reversed.

SAMUEL P. SIMPSON v. VARDRY McBEE.

A covenant to submit a matter of difference to arbitration, will bind a party to perform the award, although there is no express stipulation to that effect; and in an action upon the covenant, non-payment of the sum awarded may be assigned as a breach.

The plaintiff had brought an action for slanderous words, against the defendant; and before the return of the writ, the parties agreed to refer the controversy to arbitrators; and a covenant was executed, in which it was stipulated, "to refer this cause" (the action for slander) "to the arbitrament, award, and final determination of, &c.; and which award when made in writing, and signed by the arbitrators, if made on or before the first day of January next, shall be made a rule

of Lincoln Superior Court of law." There was no express stipulation that the parties should abide by and perform the award. On the 22nd of October following the date of the agreement, the arbitrators met, and by their award in writing, directed the defendant to pay the plaintiff two hundred dollars, and the costs of the action of slander. This action was brought upon the covenant, and the breach assigned was, that the defendant had not complied with, or abided by the final determination of the arbitrators, nor performed the award made by them. The defendant pleaded *"covenants not broken,"* and *"performance."*

On the trial before *Dick, J.,* at Lincoln, on the last Fall Circuit, the plaintiff offered to prove, that the defendant had refused either to permit judgment to be entered in the action of slander, for the sum awarded against him, (see the question upon the award in the action of slander reported in 14 N. C., 531) or to pay that amount; but his (230) Honor, being of opinion that the plaintiff could not recover, directed a verdict to be entered for the defendant; and the plaintiff appealed.

D. F. Caldwell and *A. M. Burton,* for the plaintiff.
J. W. Norwood, for the defendant.

DANIEL, Judge: In making up the case for this Court, the judge has not stated his reasons, why he thought the plaintiff could not recover. We, however, from the case stated, think the plaintiff was entitled to recover, if his evidence supported his allegations. *Lupert v. Wilson,* 11 Mod., 170, was an action of covenant brought on an agrement to refer all matters in difference to an arbitration. The arbitrators awarded five hundred pounds to be paid, and general release to be given. It was argued, that though no express words were in the covenant, that the defendant should *perform* the award, yet it should be good by implication. *Lord Holt* said, that the very referring a thing to arbitration, is a mutual undertaking that each party shall perform his part of the award; for otherwise it cannot be said to be referred. In concluding his opinion he said, where two persons submit to an award, this amounts to mutual promises. In *Purslow v. Bailey,* 2 Lord Ray., 1040, *Lord Holt* again said, the submission is

an actual mutual promise to perform the award of the arbitrators; and in such actions, whilst he was a practiser, and since he had been a judge, the submission had been always held sufficient evidence to maintain the action. And if so, then it is within the same reason as when a submission is by bond, &c. In the case before us, we think the agreement in the deed to submit, imported a covenant to perform the award; and that the defendant's refusal to perform, was a breach of the covenant. There must be a new trial.

PER CURIAM. Judgment reversed.

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(231)

HENRY WILLIS et al. v. WILSON J. HILL.

1. If one partner borrows money upon his own credit, and gives his own separate security and obligation for the amount, the other partners will not be responsible for it, although it was applied to the use of the firm.

2. Although the admissions of a partner, made after a dissolution of the partnership, may be used to repel the statute of limitations and the like, yet this is confined to cases where the copartnership debt is proved *aliunde*. Such admissions are incompetent to establish the debt originally as one due by the partnership.

Assumpsit for money lent, and for money paid, laid out and expended by the plaintiffs, for the use of the defendant. Plea, *non assumpsit*.

On the trial before *Dick, J.*, at Caswell, on the last Circuit, the case was, that the defendant, prior to October, 1833, was in partnership with one Hobson, in the purchase of slaves: that a dissolution took place in that month; and that in a few days after the dissolution the plaintiffs lent Hobson a sum of money, for which they took the following acknowledgment:

"Received of Henry Willis & Co. four hundred dollars, to purchase negroes, or return in a few days.

WM. E. HOBSON. [L. S.]"

The defendant objected to this acknowledgment's going to the jury, because it was the single bond of Hobson alone, and did not purport to bind the partnership; and further, because, being under seal, the simple contract for the partnership, if

any ever existed, was merged in it; but his Honor permitted it to be read. The plaintiffs then offered certain declarations of Hobson, made just before the trial, to prove that the money was advanced to him for the use of the partnership, and was invested in the purchase of slaves, which came to the possession of the defendant, and were by him resold. This testimony was objected to, but received by the Court. His Honor charged the jury, that the fact of the plaintiffs' taking the single bond of Hobson, at the time of advancing the money, was not conclusive evidence of the advance being solely upon his credit; that if the money was advanced upon the credit of the partnership, the defendant having no (232) notice of its dissolution, or if it was applied to the use of the partnership, the plaintiffs were entitled to a verdict. A verdict was returned for the plaintiffs accordingly; and the defendant appealed.

J. T. Morehead, for the defendant.
W. A. Graham, for the plaintiffs.

RUFFIN, Chief Justice: Although the use by a firm of money, borrowed by one of the partners, may be evidence that it was borrowed for the partnership, and upon its credit, yet it may be doubted whether such an inference is admissible, when the borrowing partner gives his own separate security and obligation for the amount. It is distinguishable from the case of *Horton v. Child,* 15 N. C., 460, because there a joint debt, both in law and in fact, was constituted by the sale of the goods to the partnership, and the obligation thereon of the one partner, was not merged in the bond subsequently given by the other. But in this case, the question is, whether there ever was a joint debt; that is to say, whether the contract was made with the firm, or made with Hobson individually. The money was advanced to Hobson, and his separate note taken for it; and it does not appear, that at the time any reference was made to the partnership, either as the beneficial borrower, or as being liable for the repayment. The express contract at the time of the loan with the borrowing partner, it should seem, ought to prevent the lender from afterwards making himself the creditor of the firm. That seems to be a fair inference from the form of the security. *Sifflin v.*

Walker, 2 Camp., 308; *Emily v. Lye*, 15 East, 7. But if that may be explained by evidence, that the loan was on the credit and for the business of the partnership, notwithstanding appearances to the contrary; yet we deem it certain, that his Honor erred in stating to the jury in the alternative, that the defendant was liable if the money was advanced on the credit of the firm, "*or* was applied to the benefit of it." The last part of the alternative can only be understood to mean, that the firm was the debtor, simply because the money was
(233) used by Hobson on the joint business, although he had not only given his separate bond for it, but had actually borrowed it on his individual credit. The proposition is too unjust to be deemed reasonable or legal. One partner frequently borrows the very capital stock which he puts in, and on which his share of the profits is to grow; and yet this would make his copartners liable to the lender. When a partnership gets merchandize, which was bought by one of the members, there is a clear ground for saying that the purchase was made by the firm. But, *Lord Eldon* observes, it is not enough to prove that *money,* borrowed by an individual partner, goes into the partnership estate, to make the partners liable. He may have borrowed it and paid it in fulfilment of the articles; or to replace sums improperly abstracted by him; or to reduce his account; or for many other purposes. In *Bevan v. Lewis,* 1 Sim., 376, it was held, that if a partner borrow money on his own security only, it does not become a partnership debt, although applied to partnership purposes, and with the knowledge of the other partner. The borrowing partner is the creditor of the firm, and not the original lender. The same point is decided in *Jaques v. Marquand,* 6 Cowen, 497. Admitting therefore the declarations of Hobson to be admissible evidence and true, they did not establish a case for the plaintiff. They do not contradict the inference from the security given by him, that the money was taken up on his own credit exclusively, but rather confirm it. He says only, that he laid out the money in slaves, which the defendant received and sold; but does not say that the money was lent or borrowed for the firm or in its name.

But if those declarations had purported distinctly to affirm those facts, the Court is of opinion that they would not have been competent, and ought not to have been received for that

purpose. They are not the declarations of a partner in the course of transacting partnership business, but were made long after the notorious dissolution of the partnership, and after this suit had been pending three years, and pretty obviously to be used as evidence upon the trial. They were received probably upon the authority of the case of *Wood v. Braddick,* 1 Taunt., 104. But we think the present (234) is out of the reasoning in that case. A different principle indeed, has prevailed in many of the courts of the country, which is, that after a dissolution, the acknowledgment of one partner of an account, or of a fact, cannot bind the other, except to repel the statute of limitations. *Hackley v. Patrick,* 3 John., 536; *Walden v. Sherburne,* 15 John., 424; *Baker v. Stackpoole,* 9 Cowen, 420; *Shelton v. Cocke,* 3 Mumf., 191. And in *Bell v. Morrison,* 1 Peters, 351, the Supreme Court of the United States went so far as to lay it down that such an acknowledgment did not take a case out of the statute of limitations. With us it is decided otherwise in *M'Intyre v. Oliver,* 9 N. C., 209; and we cannot therefore adopt that proposition of *Bell v. Morrison.* Nor are we under a necessity in this case of expressing a concurrence in the other cases cited; for this is not an acknowledgment of the amount merely of a partnership debt, of which the existence is proved by other evidence; but in the absence of all other evidence of a dealing by the plaintiff with the partnership or with Hobson as one of the partners, it is an attempt to *create* a joint liability by the admission singly of one of the partners after a dissolution. It stands here much upon the same ground with an attempt to prove the partnership by such an admission. It is precisely the same case, as if the present suit had been against both Hill and Hobson, and the latter had suffered judgment by default or by *nil dicit;* which surely would not overrule the plea of the general issue by the other defendant. In *Wood v. Braddick,* the consignment was made in 1796, the dissolution took place in 1802 as of 1800, and Cox's letter, stating the balance was written in 1804. It was therefore clear that *prima facie* the partnership, and not Cox, was originally liable; and the questions were, whether the letter of 1804 was evidence to repel the statute, and also of the balance. It was held that it was, on the principle that "the dissolution is only with regard to things future, not to those

past; for with regard to the latter, the partnership continues and always must continue." But the question is, what things past are meant? Certainly, only those which (235) concern the partnership. To make the admission of one partner after the dissolution affect the other, it must be shown, otherwise than by that admission that the subject to which the admission relates did concern the joint dealing. If it were not so, it would be in the power of one person, not upon oath, to charge another with any sums, at any time, simply because they had once been partners, by admitting that, while partners, they contracted a joint debt. Such a rule is too dangerous to be tried. But the case does not stop there. This is not only an attempt to charge one man upon the admission of another, but to charge him for a debt, with which the other is apparently exclusively chargeable upon his own separate bond, and will so remain exclusively chargeable, unless by his admission he can throw a part of it on the defendant. There could not be a stronger case for rejecting the declarations; upon the ground of the suspicions thrown upon them by the relation of the parties, and the interest of the person making them, as well as that they are mere declarations, not on oath. There is *prima facie* evidence that Hobson alone contracted the debt; and conclusive evidence that he gave as the security his own separate bond; so that apparently at least he alone is liable. The *only* evidence on which the defendant is to be made liable to the plaintiff, and for contribution to Hobson, consists of the declarations of Hobson himself, made long afterwards, that the debt was originally contracted on the joint credit of himself and the defendant. They cannot be satisfactory to the mind, of the truth of the matter declared, but may mislead a jury; and therefore ought not to have been received.

In the opinion of the Court, the judgment of the Superior Court is erroneous and must be reversed; and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

Cited: Lazarus v. Long, 25 N. C., 41; *Walton v. Robinson,* 27 N. C., 343; *Street v. Meadows,* 33 N. C., 132; *Green v. College,* 83 N. C., 452; *Wood v. Barber,* 90 N. C., 79; *Springs v. McCoy,* 122 N. C., 631.

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ALLEN FINN v. HENRY M. FITTS.

A count, in a declaration for goods sold and delivered by the plaintiff, embraces equally the original promise implied by the law from the delivery of the articles, and a subsequent express promise to pay for them; because the time of the promise does not constitute a material part of the contract declared on. Hence, such subsequent promise, if made within three years, may be proved in support of the declaration, and to repel the plea of the statute of limitations.

This was an action of assumpsit, commenced by a warrant before a justice of the peace, tried at Orange, on the last Circuit, before his Honor *Judge Dick,* upon the pleas of the general issue, and the statute of limitations.

On the trial, the plaintiff proved a book account dated in 1826, and an express promise to pay it made by the defendant about two months before the warrant was issued. For the defendant it was objected, that the plaintiff had misconceived his action in declaring on the original cause of action, instead of the new promise; and of this opinion was his Honor, and nonsuited the plaintiff, who appealed.

P. H. Mangum, for the plaintiff.
Waddell, for the defendant.

DANIEL, Judge, after stating the case, proceeded: We are of opinion that in the present case the question raised by the defendant, and on which his Honor decided, did not arise upon the pleadings. In an action instituted by warrant there is no other declaration than the statement in the warrant "how the debt became due." And whether the plaintiff's case was made out by the original promise implied by the law from the delivery of the articles, or the subsequent express promise to pay for the articles so delivered, such case was embraced by the statement in the warrant. But even if the action had been commenced by writ, where a formal declaration is required, a count for goods sold and delivered would equally have embraced the first and the second promise. They are in truth *identical,* and made by the same man to the same man. The time of the promise does (237) not constitute a material part of the contract declared upon. The plaintiff would be at liberty to prove the contract

at any time before the bringing of the action. 1 Chitty's Plead., 288. If the plaintiff allege a promise not in writing twenty years before, and to a plea of the statute of limitations replies *assumpsit infra sex annos*, it is no departure, for the time in the declaration was not material. *Coll v. Hawkins*, 1 Stra., 21; *Mathews v. Spicer*, 2 Stra., 806; *Webly v. Palmer*, 1 Salk., 222; *Howard v. Jennison*, *Ib.*, 223; 2 Saund., 5, note 3; Archb. Civ. Plead., 226. When the day in the declaration is material, as in an action on a bill of exchange or a promissory note, the question presented in this case might have arisen. Until it is properly presented, it would be rash in us to express a judicial opinion. The nonsuit must be set aside, and a new trial granted.

PER CURIAM. Judgment reversed.

Cited: *Thompson v. Gilreath*, 48 N. C., 495; *Fleming v. Staton*, 74 N. C., 204.

THE STATE v. PHARAOH MITCHELL.

In a criminal prosecution, where, upon a conviction in the County Court, the defendant appealed to the Superior Court, and in that court an order was made for the removal of the cause to an adjoining county for trial, it is too late for the State, when the cause is called for trial in such county, to have the appeal dismissed for want of an appeal bond, especially where the defendant had been in custody ever since the conviction.

The defendant was convicted of petit larceny in the County Court of Randolph, and appealed to the Superior Court. In that Court an order was made for the removal of the cause for trial to the county of Guilford, where, upon the cause being reached on the last Circuit, Mr. *Solicitor-General Poindexter*, moved to dismiss the appeal, because no appeal bond had been given. The defendant had been in custody from the time of his conviction in the County Court, till the making the motion to dismiss his appeal. His Honor *Judge Dick*, refused the motion to dismiss, and at the request of
(238) the solicitor-general, permitted him to appeal, on behalf of the state, to the Supreme Court.

STATE *v.* MITCHELL.

The *Attorney General* for the state.
The defendant was not represented in this Court.

DANIEL, Judge: The construction which has been uniformly put on the act of 1777, has been, that the defendant might appeal when convicted on any indictment in the County Court. The act requires, for the benefit of the appellee, that bond and security should be given. If an appeal has been allowed, and the appellant has omitted to give security, it is in the power of the appellee to have the appeal dismissed; but it being for his benefit, he may, if he chooses, waive it. And this waiver may be express or implied. If the waiver is express, as an entry on the record to that effect, the Superior Court will entertain and proceed with the appeal. The appeal bond to be inserted in the transcript of the record, is not a *sine qua non*, to give the appellate Court jurisdiction of the case. The waiver of the bond may be implied by the appellee suffering the cause to go to the jury before any motion made to dismiss. *Ferguson v. M'Carter*, 4 N. C., 544; *Smith v. Niel*, 9 N. C., 14. These cases impliedly overrule the case of *Gibson v. Lynch*, 5 N. C., 495. In the case now under consideration, the record shows, that the defendant on conviction in the County Court, prayed and obtained an appeal to the Superior Court; and on the transcript of the record being carried into the Superior Court of Randolph, a motion was made to remove the indictment to the Superior Court of Guilford for trial; which motion was granted, and an order made accordingly. The defendant, by force of that order, was carried to Guilford; and at March term, 1837, of that Court, the *Solicitor General* moved the Court to dismiss the appeal, on the ground that no appeal bond had been given. We think that these proceedings in Randolph Superior Court, amount to a waiver of the appeal bond; but it further appears, that the defendant has been in the custody of the sheriff ever since the conviction in the County Court. His remaining in custody, would not of itself dispense with (239) the necessity of a bond, if the state had made a motion to dismiss at the proper time. But it is a circumstance, when connected with the submission on behalf of the state in the Superior Court of Randolph, to the order of removal, which strengthened the implication of a waiver on behalf of the

state, of an appeal bond. The decision made by the judge, on the motion of the solicitor, is, in our opinion, correct. This opinion will be certified to the Superior Court of Law for Guilford county, with directions to proceed on the trial of the indictment.

PER CURIAM. Judgment affirmed.

JOHN PURTEL, Adm'r of THOMAS PURTEL v. JOHN M. MOREHEAD et al.

An acknowledgment of a balance, "due at the end of three months," for the delivery of certain specified articles, is not a promissory note, because it contains no express promise to pay, but is a stated account; and a partial failure of the consideration, as a mistake in the quantity of the articles delivered, may be proved in reduction of the amount admitted on its face to be due.

This was an action of assumpsit, commenced originally by a warrant before a single justice of the peace. Plea, *non assumpsit*.

On the trial, before *Dick, J.*, at Rockingham, on the last Circuit, the plaintiff produced and proved the following acknowledgment:

"Morehead and Field bought of Thomas Purtel hides to the amount of ninety-seven dollars and forty-eight cents; and paid him in leather four dollars and eight cents; leaving a balance of ninety-three dollars and forty cents, due him at the end of three months.

BURTON FIELD,
FOR MOREHEAD & FIELD."

The defendants on their part offered to prove that the acknowledgment was given as evidence of the probable
(240) amount due for a quantity of green hides at twelve and a half cents the pound, upon the supposition that their weight was a certain amount; that it was agreed at the time of giving the acknowledgment, that the hides should be weighed when dry, and accounted for at their actual weight; and that upon their being thus weighed, they fell short five hundred or six hundred pounds. His Honor re-

jected this evidence; and the plaintiff obtaining a verdict, the defendants appealed.

No counsel appeared for the defendants in this Court.
J. W. Norwood, for the plaintiff.

DANIEL, Judge: The paper writing offered in evidence by the plaintiff is not a promissory note; it contains no express promise to pay. It could not be declared on as a promissory note. It is a liquidated and signed account within the meaning of our act of assembly. It is an account stated; and it is so declared on by the plaintiff in his warrant. What is an account stated? In *Trueman v. Hurst,* 1 Term, 42, *Lord Mansfield* said, it is an agreement by both parties, that all the articles are true. This was formerly conclusive, but a greater latitude has of late prevailed in order to remedy the errors which may have crept into the account in surcharging the *items.* In *Holmes v. D'Camp,* 1 John., 36, *Judge Spencer* said, formerly the stating of an account was considered so deliberate an act, as to preclude any examination into the *items.* A greater latitude has of late prevailed, and any errors may be shown and corrected; but still the stating of an account is regarded as a consideration for the promise; and it is in law in the nature of a new promise and supports the count of *insimul computasset* without any other consideration being shown by the plaintiff. 2263½ lbs. of hides at twelve and a half cents per pound, would come to ninety-seven dollars and forty-eight cents, as stated in the account. The defendant wished to prove, that at the time the settlement was made, the above weight of the hides was only conjectural by the parties, as they were then wet, and it was then agreed by the parties, that the hides should be dried and accounted for at their actual weight when dry. When dried, (241) they fell short in weight five or six hundred pounds. Here was an error in the estimation of the weight, which was expressly agreed by the plaintiff's intestate should be rectified, if detected, on the hides being weighed when dry. The judge refused this evidence going to the jury. We suppose he refused it on the belief that the paper was a promissory note, and that the partial failure of consideration could not be admitted in evidence according to the case of *Washburn v.*

Picot, 14 N. C., 390. But we are of the opinion that as it contains no express promise to pay, it is not a promissory note, but the paper must be considered as an account stated; and then the authorities mentioned in this opinion, oblige us to say, that the evidence was admissible.

PER CURIAM. Judgment reversed.

Den ex dem. JACOB HARTZOG v. RANDOLPH HUBBARD.

1. In questions of boundary, the declarations of a deceased person are admissible in evidence; but not those of a person who has removed from the State.

2. A person in possession under a claim of title, who receives from an opposing claimant a lease for a year of the same land, cannot, during that term, dispute the lessor's title, or hold adversely to him.

Ejectment, tried at Ashe, on the last Circuit, before *Saunders, J.*

The lessor of the plaintiff in deducing his title, produced, first, a grant from the state to Robert Nall, dated in the year 1802, describing the boundaries of the land as "beginning on a *chestnut* near the wagon road, on the top of the Blue Ridge, &c., running west two hundred poles to a Spanish oak," &c.; and, secondly, a deed from Nall to himself, dated 15 April, 1832, containing the same boundaries.

The defendant claimed title to the land in dispute, under a grant to Peggy Tyre, dated 30 Nov., 1831; and then produced a deed from her to himself, dated 6 March, 1832. To
(242) show the beginning of the grant to Nall, the lessor of the plaintiff introduced two witnesses, who testified that one Callaway, who was an intelligent surveyor, and who was then dead, had pointed out to them the chestnut tree, which, he said, was Nall's beginning corner: that the tree had been cut down; and that the stump claimed by the lessor of the plaintiff as the beginning of that patent, was the stump of that chestnut tree. This evidence was objected to by the defendant, but was admitted by the Court. The defendant then contended, that, at the date of the deed from Nall to the lessor of the plaintiff, the land was held adversely to

Nall, by himself; under his deed from Peggy Tyre; and that therefore the lessor of the plaintiff's deed of the 15th of April, 1832, was void. To repel this, by showing that the defendant did not have the adverse possession of the land at that time, the lessor of the plaintiff introduced Peggy Tyre as a witness. She said that she had settled on the land, supposing it to be vacant, and had taken out out a grant for it in the year 1831. After that time, as she stated, she heard of the lessor of the plaintiff's claim to the land and went to see him in January or February, 1832, when he informed her of his claim; and that the land had been granted to Nall before the date of her patent: that she then agreed to give up the land; and the lessor of the plaintiff consented that she might remain for that year, and make a crop: that after this, the defendant purchased her right for twenty-five dollars, when she told him of the lessor of the plaintiff's claim, and that she was then holding possession for the lessor. She admitted, that being dissatisfied, she had agreed with the defendant to hold possession for him for a while. She stated further, that in the fall of that year the defendant sowed wheat on the land, and the plaintiff, with her consent, ploughed up the wheat, and sowed the land in rye. His Honor charged that under these circumstances, the possession was not held so adversely as to make void the deed from Nall to the lessor of the plaintiff. The jury returned a verdict for the plaintiff; and the defendant appealed.

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D. F. Caldwell, for the defendant.

No counsel appeared for the plaintiff's lessor.

DANIEL, Judge, after stating the case, as above, proceeded: On the first point, we are of opinion, that the evidence of the two witnesses, as to what Callaway the surveyor, who was then dead, told them about the chestnut tree being the corner of Nall's patent, was admissible. This question has been frequently so decided in this state. *Harris v. Powell,* 3 N. C., 349; *Tate v. Southard,* 8 N. C., 45; *Standen v. Bains,* 2 N. C., 238; *Taylor v. Shuford,* 11 N. C., 132. The rule of admitting hearsay evidence to prove the boundaries of land, must be confined to what persons now dead have said; for if

they be alive at the time of the trial, though out of the state, their depositions ought to be procured. *Gervin v. Meredith,* 4 N. C., 439.

Secondly. Peggy Tyre, in February, 1832, admitted Nall's title, and took a parol lease of the land for that year, to make a crop on it. She, being so in possession, informed the defendant that she held the same under Nall's title. The defendant, notwithstanding, took a deed for the land from her, dated 6 March, 1832; and she then agreed to hold possession for him for a while. It does not appear that Nall, or the lessor of the plaintiff, had any notice of the conveyance by Peggy Tyre to the defendant, or of her agreement to hold possession for him, at the time Nall made the deed to the plaintiff's lessor, on 15 April, 1832. We think with the judge who tried the cause, that the possession of Peggy Tyre, under all the circumstances, was not such an adverse possession as to render the deed from Nall to the plaintiff's lessor void; but that her possession under the parol lease continued, and was attached to the better title, and was in law the possession of Nall, at the date of the execution of the deed to the lessor of the plaintiff, 15 April, 1832. We think that the motion for a new trial was correctly overruled by the Court, on both points, and that the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Huffman v. Walker, 83 N. C., 415; *Farmer v. Pickens, Id.,* 552; *Mason v. McCormick,* 85 N. C., 228; *Whitehurst v. Pettipher,* 87 N. C., 179; *Bethea v. Byrd,* 95 N. C., 311; *Shaffer v. Gaynor,* 117 N. C., 20.

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MURDOCK D. MURPHY v. DANIEL McNIEL.

1. A sworn copy of a letter cannot be received without accounting for the original.

2. One party cannot give in evidence a conversation between himself and a third person in the absence of the other party; for as to what the party himself said, it was only his own declaration; and as to what the third person said, it was not on oath, and the opposite party had no opportunity to cross-examine him.

3. Declarations of a witness inconsistent with his testimony on trial, may be given in evidence to discredit him.

Detinue for a yoke of oxen, tried at Robeson, on the last Circuit, before *Settle, J.*

The plaintiff, in proof of his title, offered in evidence the deposition of one Malcom Patterson, in which the witness gave the copy of a letter from the plaintiff to him, the witness; but this part of the deposition was objected to by the defendant, and rejected by the Court. The plaintiff then offered to prove a conversation between himself and Malcom Patterson in relation to his directing Patterson to take care of the oxen; which conversation occurred at the time plaintiff paid Patterson some money, which was paid on account of the oxen; but this testimony was also objected to and rejected.

In the course of his defence, the defendant offered to prove a conversation between Patterson, the plaintiff's witness, and a third person, at which neither the plaintiff nor defendant were present, in which Patterson spoke of a sale of the oxen to one Locklear, under whom the defendant claimed, for the purpose of discrediting Patterson, who had stated in his deposition that he had not sold the oxen to Locklear. This evidence was objected to by the plaintiff, but was received by the Court. The jury found a verdict for the defendant; and the plaintiff moved for a new trial upon the grounds, first, that the court had refused proper evidence offered by him: and secondly, that improper testimony offered by the defendant had been received. The motion for the new trial being refused, the plaintiff appealed.

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No counsel appeared for the plaintiff.

Strange, for the defendant.

DANIEL, Judge, after stating the case shortly, proceeded: As to the first ground, the plaintiff did not show, that it was out of his power to produce the original letter which he wrote to the witness Patterson. The sworn copy, as set forth in the deposition, was not then the best evidence of which the nature of the case admitted; therefore the Court was right in rejecting it.

The conversation between the plaintiff and the witness Patterson, at the time some money was paid him by the plaintiff on account of the oxen, relative to Patterson's taking care of them, was not admissible. If it was intended to be the conversation of the plaintiff, it was inadmissible as evidence, as no party to the record can give his own declarations in evidence for himself. If it was intended to be the declarations of Patterson, it was equally inadmissible, as they were not on oath, and the defendant had no opportunity to cross-examine him.

As to the second ground, the defendant, to discredit Patterson, the plaintiff's witness, and to show that the account given by him on oath was not correct, offered to prove a conversation between Patterson and a third person, when neither of the parties were present; in which conversation Patterson spoke of a sale of the oxen to one Locklear, under whom the defendant claimed. This evidence was objected to by the plaintiff, but admitted by the Court. We think it was properly admitted. The credit of a witness may be impeached either by cross-examination subject to certain rules; or by general evidence affecting his credit; or by evidence that he has before done or said that which is inconsistent with his evidence on the trial; or lastly, by contrary evidence as to the facts themselves. 1 Starke Ev., 181. Patterson, the plaintiff's witness, had denied in his deposition, that he had, at any time, sold Locklear two steers. The defendant's evidence was to prove that Patterson had said that he had sold the steers to Locklear. The evidence offered by the de-
(246) fendant for this purpose was admissible according to the above authority. The Judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Jenkins v. Cockerham, 23 N. C., 312; *Rowland v. Windley,* 86 N. C., 39; *Gillis v. R. R.,* 108 N. C., 447.

BENJAMIN O'KELLY v. JOHN CLAYTON and RICHARD O'KELLY.

1. A grantee cannot, under the act of 1798 (Taylor's Rev. App. 193), maintain a *scire facias*, to repeal a prior grant of the same land: neither will the fact of his entry being the first, entitle him to that remedy.

2. The case of *Crow v. Holland*, 15 N. C., 417; and *Featherston v. Mills*, Ibid 596, approved and followed.

This was a *scire facias*, at the relation of Benjamin O'Kelly, to vacate a grant issued to the defendant, Richard O'Kelly. It was suggested therein, and charged in the petition, that the relator, on 4 Jan., 1830, made an entry, No. 3389, in the county of Buncombe, of six acres of land, on North Glade Creek: that immediately thereafter, at the request of the defendant Richard, he made in the name and for the benefit of said Richard, another entry, No. 3390, of fifty acres of land adjoining the above entry of the relator: that the other defendant, Clayton, afterwards represented to Richard, that each of those entries covered land which belonged to him, and induced Richard to abandon his entry, and surrender to him, Clayton, the warrant: and that Clayton, with knowledge of the prior entry of the relator, and with the intention to cheat and defraud him, afterwards procured a survey, and had it made so as to include the most valuable part of the land entered by the relator, and obtained a grant in the name of Richard O'Kelly, dated 22 Nov., 1831, and under it took possession of the land: and that afterwards, the relator procured his grant dated 22 Dec., 1831.

On the motion of the defendants, his Honor *Judge Pearson*, at Buncombe on the last Circuit, quashed the *scire facias*, and dismissed the petition, upon the ground that the relator, being the junior patentee, was not entitled to this (247) remedy; from which an appeal was taken to this Court

No counsel appeared for either party in this Court.

Ruffin, Chief Justice, after stating the case as above, proceeded as follows: The decision of his Honor is in conformity to the cases of *Crow v. Holland*, 15 N. C., 417; and *Featherston v. Mills, Id.*, 596. If this appeal was intended

to bring under consideration the doctrine of those cases, it is to be regretted that the appellant has not aided us by another argument. Although those decisions were made upon advisement after full arguments, the Court would cheerfully listen to any well founded objections to them, choosing rather to retract our error than to persist in it. But as no member of the Court has at any time entertained a doubt upon any one of the positions on which those decisions rest, the rule of the common law, the provisions of our statute, and the principles and policy which govern its construction, we see no reason to be dissatisfied with the opinions there delivered, but retain them entirely. Indeed, we conceive that a contrary doctrine, judicial or legislative, would disturb the public repose, endanger numerous old titles, and be fraught with public inconveniences and private mischiefs, the extent of which is beyond the forecast of any man.

The right to vacate a grant of the sovereign, must originally be the right of the sovereign alone. It may be exercised upon the ground that the patent was obtained to the injury of the public, strictly speaking; as if the officers entrusted with the duty were to issue a patent without payment of the purchase money into the treasury. It may also be exercised upon the ground that the sovereign has been betrayed by false suggestions, into making a deed to one person to the prejuduice of another; as if a patent be obtained for land which the state has already granted or agreed to grant; for it is a fraud on the state, and an injury to her, to make her involuntarily the instrument of injustice and wrong to individuals. The (248) right of this remedy has however been delegated to "any person aggrieved by any patent," and such person is allowed to use his great prerogative writ as a private remedy. But in what state of facts can he thus use it? We think clearly that it can only be, when the act complained of was, in its perpetration, an injury to the state, and also on the relator. Both must concur. If no individual be injured at the time, but the state only, to the state exclusively belongs the redress. The state did not mean to invoke the aid of individuals in redressing wrongs on her, nor to confer on them the power to sue for her use. When the proceeding is for her benefit, she not only acts in her own name, but acts through her own officers. She will not act on the relation of a private person,

unless upon the suggestion, sustained by proof, that he had such a legal interest in the thing, as made it unjust in her to bestow it on another; which cannot be if the relator's interest be subsequently acquired. Such, we think, is the obvious sense of the words of the statute, as well as the principle of the common law.

But that sense is indubitably confirmed to our apprehension, when it is considered what consequences would follow from inciting the cunning and litigious to a scrutiny of all the patents issued since the declaration of independence, with a hope of detecting some irregularity in the entry, warrant, survey, or other proceeding on which the patent was founded. Suits would be multiplied to an endless extent, and no title since the revolution could be called sure. Half our territory would be scrambled for by the most worthless men, and much of it wrested upon some latent and unintentional defect, from the peaceful and honest possessors. Now, to the state it is immaterial to which one of two of her citizens she grants a particular tract of land: from each she gets the same price for granting, and the same revenue for it when granted. She will not, therefore, for herself, insist on vacating the grant in every case in which she might do so; because it is her policy to parcel out the public domain among her citizens; and by law the land would immediately become the subject of entry again at the same small price, and her fiscal interests be therefore in no wise promoted. Can it be supposed (249) then, that the purpose of the act of 1798, was to hatch a swarm of land-jobbers to harass, in the name of the state, her patentees, whose quiet she would not herself disturb, and to draw into question the titles made by herself? That the authors of the commotion should be rewarded with the spoils they could gather, provided they would pay for the land—settled, improved, and cultivated under the old patent, the price of wild, and unappropriated land? It is impossible to impute to the legislature a policy so cruel and so ruinous. But to say nothing more upon that head, a short and conclusive answer to the argument is, that a subsequent grant, is, as such, and *per se,* void, and may be vacated at the suit of the state, for no other reason than that the land was before granted. The statutes authorize the entry and grant of such lands *only* "as have not been before granted." Consequently, it is

"against law" to obtain a grant for land, while a previous grant for the same land remains in force. Now, when the record shows upon its face that the title of the relator was obtained against law and ought to be vacated, it would be too much to hold, that nevertheless he had an interest in the subject which rendered a prior grant *a grievance to him.* If there were an actual fraud on the state, or her interests were really prejudiced, the course of the junior patentee is to inform the authorities of the state, so that they may act for her, as may best promote her interest or her honour.

If these conclusions be correct, it further follows, certainly, that a prior entry will not help the relator, for the reasons given in *Featherston v. Mills,* 15 N. C., 596. An elder entry creates an equity which converts a patentee of the same land into a trustee, provided he has notice of the entry. Such notice makes the patentee guilty of a fraud on the party complaining; and that is an appropriate ground for the relief granted, namely, a decree for a conveyance. But that is very different from repealing the grant at law, merely because the land had been entered and was therefore not the subject of the second entry, on which the grant emanated. For we take it, that such must be the rule, and that notice or not (250) of the previous entry could make no difference, since the repeal does not go on the fraud on the private party, but on that upon the state, or the illegality of the grant. The injury to the enterer is an injury to the equitable owner, and supposes the patentee to be the legal owner; and the decree for a conveyance is a complete relief. To give this other remedy by *scire facias* to cancel the record in the name of the state, would be without necessity or fitness.

PER CURIAM. Judgment affirmed.

Cited: Carter v. White, 101 N. C., 33; *Wyatt v. Mfg. Co.,* 116 N. C., 282.

THE BANK OF THE STATE v. JOHN TAYLOR.

The act of 1831, c. 34, allowing appeals to the Supreme Court from interlocutory judgments, does not alter the nature of the judgments to be reviewed, but only the time of that review. Nothing but errors in law can be examined on appeals to the Supreme Court. Hence an order giving the defendant time to plead, unless the plaintiff will consent to certain terms, is not the subject of appeal.

This was an action of *assumpsit,* upon a promissory note purporting to have been signed by the defendant, as the surety of one Hathaway.

At Wake, on the last Circuit, the defendant filed an affidavit stating that the note was a forgery: that he had for many years resided in the state of South Carolina; and that the only witness he could rely upon with certainty to disprove the pretended signature being his, also resided in that state. Upon this affidavit, he moved for a rule giving him time to plead, until the plaintiff should consent for the note to be attached to a commission to examine witnesses in South Carolina; submitting to any order which might be deemed necessary for the security of the plaintiff.

His Honor *Judge Bailey* doubted the propriety of granting the rule; but upon the suggestion of the counsel on both sides, that it was an important point of practice; and that a refusal to grant it could not be appealed from, and the question thereby settled, be granted it *pro forma;* and the plaintiff appealed.

(251)

Badger, for the plaintiff.
Devereux, for the defendant.

GASTON, Judge: As the order appealed from was put into its present form for the purpose of getting the opinion of this Court, upon an interesting question of practice; and as the question has been here argued, and our minds are made up, we regret the disappointment we must cause to the parties by declining to decide it. But it seems to us that the appeal has been improvidently allowed, and that we cannot take cognizance of the matter brought up by the appeal.

The jurisdiction of this Court in regard to suits at law is wholly appellate, and confined to the correction of errors in

law. Under the act of 1818, (*Rev. c.*, 962) it was required that a final judgment should be rendered below, before an appeal could be taken to this Court. The act of 1831, c. 34, authorizes the judges of the Superior Courts, at their discretion, to permit appeals from interlocutory judgments. This act has not changed the nature of our jurisdiction, but only provided a new mode for its exercise. The jurisdiction of this Court is still that of a court of errors, although, under the act of 1831, it may revise, before the rendition of a final judgment, such errors as under the act of 1818 could not have been brought before it until after final judgment. No new subjects for revision are contemplated by the act of 1831. Its only purpose seems to be to prevent the delay of correcting error, and to save the inconvenience and expense of perseverance in it.

The order appealed from is not in the nature of a judgment, final or interlocutory. It does not purport to be the sentence of the law pronounced upon the matters in contestation between the parties, as appearing from their pleadings. It is a decision on a collateral motion, which however made, and whether right or wrong, does not enter into the record of the suit, nor affect with error the subsequent proceedings (252) in it.

If an appeal would lie in this case, it might be brought upon the determination of any other of the innumerable rules and orders not affecting the legal merits of a cause, but incidental to the exercise of the Court's general control over the management of the cause and over the conduct of its suitors.

While we shall always cheerfully perform, to the best of our ability, every duty imposed upon the Court, we must take care to abstain from the exercise of every authority not granted to it. As the law has not, in our judgment, conferred on us the jurisdiction of revising the order made in the Court below, we cannot do so, although by permitting the appeal, his Honor has invited that revision from us.

PER CURIAM. Appeal dismissed.

JOHN COLE, et Uxor, et al. v. WILLIAM TERRY.

Joint owners of a chattel have equal right to the possession of it; and therefore the exclusive possession of the chattel by one, will not entitle the other to maintain trover against him for it.

This was an action of *trover,* brought to recover damages, for the conversion of a negro slave named Charlotte, tried at Richmond, on the last Fall Circuit, before *Saunders, J.* The facts of the case appeared on the trial to be as follows: Thomas Foxhall, by his will, made in the year 1791, bequeathed a female slave named Fann, and her increase, to his daughter, Joanna Surginor, for life, and after her death to be equally divided between all her children. The slave Charlotte was the daughter of Fann, and was born after the probate of the will. The executors assented to the legacy, and the husband of Joanna Surginor took possession of the slaves Fann and Charlotte. Joanna Surginor had eight children; and she, together with her husband and two of her children, to-wit, James and Charlotte Surginor, in the year 1804, conveyed by a bill of sale to the defendant, the (253) slave Charlotte, then about two years of age; who took possession of her, and held her, claiming her as his own absolute property. Joanna Surginor, the owner for life, died in the year 1831, and this suit was brought by those of the children who had not joined in the bill of sale above mentioned. His Honor, in his charge to the jury, told them, "that before they could charge the defendant with a conversion, they must be satisfied, that after the death of Joanna, he held possession of the slave adverse to the plaintiffs, claiming her absolutely as his own property, denying any right or interest of the plaintiffs to the said slave."

There was a verdict for the plaintiffs; and the defendant appealed.

Badger, for the defendant.
Devereux, contra.

DANIEL, Judge, after stating the facts as above, proceeded: The bill of sale, transferred to the defendant, all the interest in the slave Charlotte, during the life of Joanna Surginor,

and on her death two-eighths of the remainder in said slave. The defendant therefore, on the death of Mrs. Surginor, became tenant in common of the slave with the plaintiffs. The law having fixed and established the rights of the parties, the defendant could not alter the relation in which he stood to the plaintiffs, by denying their title, or claiming adversely to them. In *Smith v. Oriell,* 1 East, 367, it was decided, that after the bankrutcy of one of two partners, if the other, being solvent, delivers partnership goods to a third person for a valuable consideration, the assignees of the former cannot maintain trover, for they are tenants in common with the consignee by relation. The same doctrine is to be found in *Fox v. Hanbury,* 2 Cowp., 445; *Ramsbottom v. Lewis,* 1 Camp., 279; *Smith v. Stokes,* 1 East, 363. The law, for reasons of policy, and on account of the difficulty of legislating on the subject, does not interfere to regulate the enjoyment of chattels amongst part owners, except in the instance of ships, to prevent their being unemployed. Abbott's (254) Shipping, 70. If one of two tenants in common take the whole into his possession, the other has no remedy at common law, but to take the joint property from him who has done the wrong, when he can do so without a breach of the peace. Litt., sec. 123; and per *Lord Coke,* Co. Litt., 202 a; *Brown v. Hedges,* 1 Salk., 290. The reason why one tenant in common cannot maintain trover against a co-tenant, seems to be, that the possession by one is in law the possession of both. 1 Salk., 290. The defendant in this case obtained the possession rightfully and not tortiously. This Court, in the case of *Lucas v. Wasson,* 14 N. C., 398, decided that joint tenants of a chattel have equal rights to its possession, and cannot maintain trover against each other, unless the joint property is destroyed. We are of the opinion that the judge was mistaken as to the law in his charge; and that there must be a new trial.

PER CURIAM. Judgment reversed.

BURCH CHESHIRE v. JOHN CHESHIRE, Executor of JOHN CHESHIRE.

1. If a testator by his will forgive a debt, the assent of the executor is necessary before the debt is extinguished.

2. An assent to a legacy by the executor may be presumed from his acts or declarations, as well as expressly proved; and where, upon a bequest of a pocket-book and its contents, the executor estimated the amount, and stated that that was all the legatee took under the will; it was *Held* to be not in law an assent, but only a fact from which it might be presumed.

This was an action of *assumpsit*, tried before *Saunders, J.*, at Rowan on the last Circuit. The declaration contained the several money counts; and the defendant pleaded the "general issue, payment, and set-off." After the plaintiff had introduced evidence in support of his claim, the defendant offered as sets off several payments made by him on account of the suretyship of his testator for the plaintiff; and produced further several judgments which his testator had taken up during his life, to which he had been surety for the plaintiff, amounting to six hundred dollars. These judgments (255) were objected to as sets off, by the plaintiff, because, as he contended, they were bequeathed to him under the following clause in the will of the testator, to-wit: "Seventhly, I give and bequeath to my son Burch Cheshire, my little pocket-book and all the papers that is in it, to him and his heirs." And to identify the judgments as forming a part of the contents of the pocket-book, and to show the assent of the executor to the bequest, the plaintiff proved by a witness, that the defendant had showed him the pocket-book, and said that it and its contents were the only legacy left the plaintiff by his father: that he called them over, and they consisted of judgments and other evidences of claims paid by the testator on account of the plaintiff, amounting to six hundred dollars; and that he then spoke of it as the plaintiff's legacy.

His Honor charged the jury, that "if they were satisfied as to the plaintiff's claim, and the amount, they would only allow such sets off as had been proved independent of the contents of the pocket-book; these passed under the will to the plaintiff, either as a donation or extinguishment; in either case no assent by the executor was necessary: in the former,

the assent might be inferred from what had been shown, and from the conduct of the executor, as there was no allegation of any want of assets." There was a verdict and judgment for the plaintiff, disallowing the judgments as sets off; and the defendant appealed.

D. F. Caldwell, for the plaintiff.
No counsel appeared for the defendant.

GASTON, Judge: There is a clerical mistake in the transcript, which perverts the meaning of the instruction given on the trial. The defendant offered as a set-off against the plaintiff's demand, the amount of sundry judgments which had been paid off for the plaintiff by the defendant's testator, as his surety. The plaintiff repelled this set-off by virtue of a bequest in the testator's will in these words: "I give and bequeath to my son Burch Cheshire my little pocket-book, and all the papers in it;" and by testimony, that after the
(256) death of the testator, defendant showed the pocket-book, and said that the book and its contents were the only legacy left to the plaintiff; and called over the papers, which consisted of the judgments so paid off. His Honor is represented in the transcript as having instructed the jury, upon this evidence, not to allow this set-off: that the contents of the pocket-book passed under the will to the plaintiff, either as a donation or by extinguishment: that in *either case,* no assent by the executor was necessary: and that in the *former,* the assent might be inferred from what had been shown, and from the conduct of the executor; as there was no allegation of a deficiency of assets. It is manifest from the context that the actual instruction was, that in the *latter* case, (that is to say, operating by extinguishment) no assent was necessary: and that in the *former* case, (as a donation) it was inferable from the evidence.

Thus understanding the instruction, we, nevertheless, are of opinion, that it is erroneous. Without entering into an examination of the conflicting *dicta* on the point, we deem it sufficient to state, that we adopt the conclusion laid down in Williams Executors, as being most in accordance with principle, and best sustained by authority. "If the testator, by will, forgive a debt due from a particular person, it is the

better opinion, that the assent of the executor is necessary to give effect, to the testator's intention; for although on the one hand, it may be alleged that the party to whom the debt is bequeathed, must necessarily have it by way of retainer, and that such a clause operates rather as an extinguishment than as a donation; and, therefore, that it needs no such assent as where there is to be a transfer of the property; yet on the other hand, a debt so forgiven, is regarded, with great reason, in the light of a legacy, and like other legacies, not to be sanctioned by the executor, in case the estate be insufficient for the payment of debts: but as soon as the executor assents, and *not before,* it shall be effectually discharged." Williams Executors, 844. Whether the executor did or did not assent to the legacy in this case, was a question of fact. The evidence given was pertinent and relevant to the establishment of the fact.
but by no means such as to warrant a direction to the (257)
jury that if believed, it established the fact. The law,
indeed, has prescribed no specific form in which the assent must be given, and the assent may be legitimately implied, as well as expressly proved. It is but reasonable, however, that the acts or expressions relied on as indicative of assent, should be unambiguous. The effect of those set forth in the transcript, might be different according to the length of time which, when they were done or used, had elapsed after the death of the testator, and many other circumstances which do not appear in the case. But they do not, *in law*, infer an assent; and it was for the jury to say, whether they proved such assent in fact. The judgment must be reversed and a new trial awarded.

PER CURIAM. Judgment reversed.

Cited: Edney v. Bryson, 47 N. C., 366; *Lowe v. Carter,* 55 N. C., 386; *Cole v. Covington,* 86 N. C., 299.

JOSIAH B. COX v. PATRICK MURPHEY.

Articles made in contemplation of marriage, whereby the intended husband "sells and assigns" to a trustee all the right in slaves belonging to the intended wife, "which he by operation of law may thereafter have," do not pass a title in the slaves to the trustee, but are merely executory, and binding the husband after marriage, to make the necessary assurances to carry them into effect.

Detinue for sundry slaves, in which a case agreed, containing the following facts, was, on the last Circuit, at Sampson submitted to his Honor *Judge Settle*. The slaves demanded by the plaintiff, were the property of Susan B. Cox, who, prior to her marriage with Abner Branson, executed articles by which the intended husband and the plaintiff, as trustee, joined. The articles, after reciting the intended marriage, and the fact of the intended wife's being possessed of the slaves in dispute, and the intention to settle them upon her, proceeded as follows: "that for and in consideration of the premises, and for and in consideration of the sum of,
(258) &c., to the said Abner Branson, by the said Josiah B. Cox in hand paid, the receipt whereof is hereby acknowledged, I, the said Abner Branson, do hereby sell, assign, and deliver, alien, and confirm, and have by these presents, sold, assigned, &c., to the said Josiah B. Cox, all the right, title, estate, interest and benefit, which I may by operation of law acquire, derive, or receive, either in law or equity, in and to the said slaves. To have and to hold, &c. And the said Abner Branson doth promise, covenant, and agree, to, and with the said Josiah B. Cox, that he will, upon the solemnization of the said marriage, or at any time thereafter when requested by the said Josiah or Susan, make, execute, and deliver, all and every necessary title, deed, or conveyance, advised or directed by counsel learned in the law, more completely to secure the intention of this indenture; which is entirely to divest himself of all right, title, and estate, in and to the above-mentioned land and slaves, so that he nor his creditors shall have no right to sell or control the same. It is further agreed and understood, by and between the said parties, that the said Josiah may receive, hold, and keep in his possession, the aforesaid slaves, hiring out the same, and paying over the proceeds to the said Susan; or suffer the same

to remain in the use and occupancy of the said Abner, he paying therefor by way of hire, one dollar, on the first day of January in each and every year, if demanded."

The marriage took place, and the slaves went into the possession of the husband, Abner Branson, and continued in his possession until his death, which took place within a few weeks thereafter; when they went into the possession of the plaintiff, the trustee; where they continued until the second marriage of his *cestui que trust,* Susan, with one Isaac W. Grice; when they passed into his (Grice's) possession, until his death, which also took place in a few weeks after the marriage. The defendant administered upon the estate of Isaac W. Grice, the second husband, and under the letters to him, claimed to retain the possession of his intestate.

His Honor, the presiding judge, gave judgment *pro forma* for the defendant; and the plaintiff appealed.

(259)

Badger, for the plaintiff.

Strange and *W. H. Haywood,* for the defendant.

GASTON, Judge: The decision of this case depends entirely on the question, whether the instrument executed by Abner Branson and Susan B. Cox, immediately before their marriage, transferred the property in the slaves therein mentioned, to the plaintiff, the trustee. The Court is of opinion, that in law, the instrument could not have this operation. The parties thereto must be intended, indeed, to have deliberately assented to all therein declared; but the question presents itself, what is thereby declared? Abner Branson does not profess to sell or transfer *the slaves* to the trustee, but only to sell and assign *the right,* which by operation of law he may *thereafter acquire* in them. *This* was not the subject of sale or assignment. The instrument can be construed as executory only, and binding Branson, after marriage, to make the assurance or assurances necessary to carry his covenant into effect.

PER CURIAM. Judgment affirmed.

Cited: Branson v. Murphey, post, 259.

HENRY BRANSON, Administrator of ABNER BRANSON, v. PATRICK MURPHEY.

This case presenting exactly the same state of facts as the preceding one of *Cox v. Murphey, ante,* 257, was before the court at the same time, and upon the principles laid down in that case was decided in favor of the plaintiff, who was the administrator of the first husband.

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(260)

AUGUSTIN VANHOOK, Adm'r of ROBERT VANHOOK to the Use of the President and Directors of the Bank of New Bern, v. CAREY WILLIAMS and JOHN BARNETT.

An administrator who is surety to a debt of his intestate, by giving his own bond in lieu of that of his intestate, and taking up the latter, intends *prima facie* a payment of the debt, and not a continuance of it.

After the new trial granted in this case at December term 1833, 15 N. C., 268 it was tried again at Person on the last Circuit, before his Honor *Judge Dick.*

Upon the second trial the case was as follows: Thomas Winstead as principal and John Garner as surety, were indebted in two several notes to the President and Directors of the Bank of New Bern; one for the sum of nine hundred dollars due 27 Feb., at their Branch Bank at Raleigh; and the other for five hundred dollars due 11 Feb., 1827, at their agency at Milton. Thomas Winstead died intestate early in the year 1827, and John Garner became his administrator, and the defendants executed the administration-bond on which this suit was brought, as his sureties. About eight hundred dollars of assets came into the hands of the administrator. Mr. Wetmore, the agent of the Bank at Raleigh, testified that Garner, on 24 Oct., 1827, gave his note with sureties to the bank for eight hundred and ten dollars and cash for the balance; and so paid or renewed the note for nine hundred dollars in that bank in which his intestate was principal and himself surety. This note of eight hundred and ten dollars

so given by Garner, was paid on 30 July, 1832, by Carey Williams, who was a surety to it, as well as one of the sureties to Garner's administration-bond. The bank brought suit on the note of five hundred dollars due at the Milton agency; and Garner, as the administrator of Winstead, and for himself as surety, confessed a judgment on the same at Sept. Sessions 1830, of Person County Court. In this action on Garner's administration-bond, brought to subject his sureties to the payment of the bank judgment, the defendants relied on their please of "conditions performed" and (261) "conditions not broken;" and contended that the confession of judgment by Garner, the administrator, did not conclude *them* as to the fact, that he had not assets properly applicable to the satisfaction of that judgment; and that in truth Garner had legally and fully administered the estate of Winstead.

His Honor charged the jury "that the evidence of Wetmore, if believed by them, proved the payment of the nine hundred dollar note, or not, according to the intention of Garner in that transaction. If Garner intended by the substitution of his note to make the debt his own, then it was a payment; but if he only intended to renew and continue the debt as the debt of his intestate, that then it was not a payment." The jury returned a verdict for the plaintiff; and the defendants appealed.

P. H. Mangum, for the defendants.
No counsel appeared for the plaintiff.

DANIEL, Judge, after stating the case as above, proceeded: This Court is of the opinion, that as Garner was surety only, and his intestate the principal in the note at the Raleigh Branch of the New Bern Bank, and discharged that note by means of cash advanced, and a discount of his own note, the testimony of Wetmore, if believed, proved a payment by the administrator of the nine hundred dollar note; and that there was nothing in the evidence which could legally authorize the jury to infer that Garner intended to continue the debt as the debt of his intestate. We are of the opinion that there should be a new trial, which is granted.

PER CURIAM. Judgment reversed.

(262)

WILLIAM WASSON v. SAMUEL KING.

A power to sell land conferred upon several executors, must be executed by all who proved the will.

This was an action of *covenant* upon a warranty contained in a deed of bargain and sale from the defendant to the plaintiff, tried before his Honor *Judge Saunders* at Iredell on the last Circuit.

The case was, that Thomas Sharpe made his will, and thereof appointed his wife and the defendant executors, and authorized them to sell his land. After the death of the testator, his widow and the defendant both proved the will, and proceeded to sell the land at public sale. A deed of bargain and sale, containing a covenant for quiet enjoyment, was executed by the defendant, but was refused to be executed by the executrix. The plaintiff instituted an action of ejectment for the land against a person who had acquired possession after the making of the deed by the defendant; but the judge who tried that cause, being of opinion that the deed of the defendant passed no title, because it was not also executed by the executrix, the lessor of the plaintiff was nonsuited, and shortly thereafter brought this suit.

Upon these facts the only question was, whether the execution of the deed by the executor, notwithstanding the refusal of the executrix to sign it, was sufficient to pass the title. His Honor *pro forma* entered a judgment of *non-suit;* and the plaintiff appealed.

No counsel appeared for the plaintiff.
D. F. Caldwell, for the defendant.

RUFFIN, Chief Justice: The intention of one who creates a power to be executed by two or more, must generally be to have the benefit of the judgment and responsibility of all of them. Hence the common law required the concurrence of all the executors in the execution of a power to sell, except when that power was annexed to the office and that became vested by survivorship in a part of them. This exception (263) stands on the sound ground, that the primary intention is a *bona fide* sale, and that it ought not to be

defeated, if at the time of the sale, all concurred who could then do so. The exception was enlarged by the statute of 21 Hen. VIII, c. 4, which enacts, that where part of the executors refuse to take the administration of the will, then the bargains and sales of lands, willed to be sold by the executors, made by him or them taking the administration, shall be as good and effectual as if the residue of the executors, named in the will and refusing the administration, had joined in making the bargain and sale. This case therefore is not embraced by the provision of the statute more than by the exception previously recognized by the common law; since here both the executrix and the executor undertook the administration, and were living at the execution of the deed. If a case be necessary upon so plain a question, that of *Debow v. Hodge*, 4 N. C., 36, is directly in point. It is said, however, that the executrix did join in the sale at auction, and therefore was bound to complete the contract by a conveyance; and that her express refusal to do so amounts to a refusal of the administration in this respect. If the propriety of that refusal were before us, it would not be difficult to justify it, in reference to the particular deed, upon the ground, if there were no other, that it purports to bind the executrix personally to a general warranty. But that is not a fit subject for the consideration of this Court. The rights of the vendee and of the co-executor to enforce the executory agreement against the executrix and heirs-at-law, by compelling her to join in a conveyance, are under the protection of another tribunal. A court of law has regard only to the executed contract, which professes to pass the title: that alone being the "bargain and sale" spoken of in the statute, and made "effectual in the law." The one before us being executed by one only of the executors then living and acting in the administration, is therefore an ineffectual execution of the power; and consequently, the judgment must be reversed and a *venire de novo* issued.

PER CURIAM. Judgment reversed.

(264)

HENRY S. SPENCER v. RICHARD M. G. MOORE, Executor of STEPHEN OWENS.

If a sheriff arrest the defendant in a *ca. sa.*, and then suffer him to go at large, he cannot afterwards retake him; and if he does so, he is liable to the defendant in an action for trespass and false imprisonment. So, also, if the arrest be made, and escape be suffered, by a deputy, the principal sheriff is responsible for the trespass and false imprisonment by reason of the second arrest, although the latter was made out of his county, it being by color of the deputy's office.

This was an action of debt, upon a bond given by the defendant's testator to the plaintiff, the sheriff of Hyde county, to indemnify him against loss by reason of any misconduct of the testator, upon receiving from the plaintiff the appointment of deputy sheriff. The condition of the bond provided, among other things, "that the said Owens shall perform all and every act or acts which he shall be legally bound to perform, and refrain from all such as shall or may be by law forbidden, during his continuance in said appointment, so that the said Henry S. Spencer shall not by any act or omission of said Owens, become liable to be complained of or sued." The breach assigned was, that one Jasper had received a judgment against the plaintiff, because Owens, by colour of his office, had falsely imprisoned him, the said Jasper. The defendant pleaded *performance;* and on the trial, before *Nash, J.,* at Hyde, on the last Circuit, the case was, that a *ca. sa.* against Jasper came to the hands of Owens, from the County Court of Washington; that Jasper was arrested by Owens, who voluntarily suffered him to escape: that Owens went to the County Court of Washington, to which the *ca. sa.* was returnable, to make his return on it, and while in that county, he again seized Jasper, under colour of his office, and surrendered him to the Court, by whose order he was committed. Jasper brought an action of trespass and false imprisonment against the plaintiff for this arrest, and recovered damages; and this action was brought against the present defendant to recover back those damages.

(265) Upon these facts, his Honor instructed the jury to find for the defendant; and a verdict being returned accordingly, the plaintiff appealed.

W. C. Stanly, and *Badger*, for the plaintiff.
J. H. Bryan, for the defendant.

DANIEL, Judge, having stated the case as above, proceeded: The sheriff, in making an under-sheriff, does implicitly give him power to execute the ministerial offices of the sheriff himself, that may be transferred by law; as serving processes and executions, making returns, and the like. *Watson on Sheriffs*, 30. If a defendant is arrested on a *ca. sa.*, and then *is voluntarily* suffered to escape, he cannot be arrested again on the same writ; if he is again arrested, he shall have his action of trespass and false imprisonment. Watson, 141; *Atkinson v. Jameson*, 5 Term, 25. But, admitting the law to be so, say the defendant's counsel, still the sheriff was not liable for the second arrest, made by the deputy, which arrest was made beyond the limits of his proper county. It is contended, that Jasper should have sued the deputy, and not the high sheriff, for false imprisonment. We think otherwise. The sheriff is liable for his own or his officer's extortions or other misconduct under colour of his office. 3 Chitty Genl. Prac., 46; Cowp., 406; Doug., 40. In the case of *Sanderson v. Baker and Martin*, sheriffs of London and Middlesex, 3 Wilson, 317, *Nares, Justice*, said, "I have for a long time thought that *trespass* and *imprisonment* will lie against the sheriff for trespass and false imprisonment committed by his bailiff in the execution of process. I know of three actions of trespass against the sheriff in cases of this kind. *Taylor v. Johnston*, B. R., tried at Stafford, in 1764, was *imprisonment* against the sheriff; the writ and warrant was to take the plaintiff in the county of *Worcester*, and the officer took him in the county of *Stafford* instead of *Worcester;* there was a verdict for the plaintiff, although it was objected, that the action did not lie against the sheriff, but only against the bailiff. I remember a similar case before *Wilmot, C. J.*, who was of opinion the action well laid against the sheriff. I also remember a third action of the same kind; so that (266) in practice it is clear that *imprisonment* lies against the sheriff for the act of his bailiff." Trespass *vi et armis* lies against the sheriff for taking the goods of A. instead of the goods of B., by his bailiff, upon the sheriff's warrant upon a *fieri facias*. In the above case, *Blackstone, Justice*, said,

that he should have thought the sheriff answerable in an action of trespass *vi et armis* for the act of his officer, although he did not recognize that act. The law looking upon the sheriff and his officers as one person, he is to look to his officers, that they do their duty; for if they transgress, he is answerable to the party injured by such transgression, and his officers are answerable over to him. 2 Keb., 352, is in point. In the case before us, it was within the scope of the powers and duties of the deputy, to go into the county of Washington to return the writ. And if the debtor had been regularly arrested, the deputy might either have confined him in the jail of his own county, and returned in the name of the sheriff *cepi corpus;* or he might have taken the debtor with him to the County Court of Washington, and then and there surrendered him. *Rutherford v. Allen,* 4 N. C., 69. He was acting by colour of his office, when he went into Washington county to return the writ, and then erroneously believed that he had the power, after what had happened, to arrest Jasper anywhere, before the return-day of the writ. The surrender of the debtor, and the return procured to be entered of record by the deputy in the name of the high sheriff, could not be disowned by the high sheriff. Watson, 32. The authorities are clear, that the plaintiff could not by any means have resisted recovery by Jasper in his action. And as the plaintiff has been damnified by the illegal act of his deputy acting in his official character, it seems to us, that he is entitled to be reimbursed by force of the conditions of the bond sued on. There must be a new trial.

PER CURIAM. Judgment reversed.

Cited: *Jackson v. Hampton,* 28 N. C., 36.

THE STATE v. JAMES R. LOVE.

An indictment for a forcible trespass to chattels, must charge the trespass to have been committed in the presence of the owner, and the taking to have been from his actual possession.

The defendant was indicted as follows:

"The jurors for the state upon their oath present, that James R. Love, late of the county of Buncombe, on, &c., with force and arms, in the county aforesaid, one grey horse then and there being in the possession of one Abel B. Hyatt, then and there, with force and arms, and with a strong hand, did take out of the possession of him the said Abel B. Hyatt, and did lead away, against the peace, &c."

Upon the trial at Buncombe, on the last Circuit, before *Pearson, J.*, the case was, that the prosecutor had purchased the horse at an execution sale of the defendant's property: that he had tied a rope about the horse's neck, and was leading him away, when the defendant, without the prosecutor's knowing it, stepped between him and the horse, untied the rope, and set the horse at liberty: that upon the prosecutor's turning round and discovering what was done, the defendant, with a drawn knife, and a large stone in his hand, ordered him off the premises.

Under the instructions of his Honor, the defendant was found guilty; but subsequently the judgment was arrested, because the indictment did not charge the trespass to have been done in the presence of the prosecutor, and the taking to have been from his actual possession. The case was brought to this Court upon the appeal of *Mr. Solicitor Guinn,* on behalf of the state.

The *Attorney-General,* for the state.

No counsel appeared for the defendant in this Court.

RUFFIN, Chief Justice: Although we do not find it stated by writers on the criminal law, yet it has been decided in this state in *State v. Trexler*, 4 N. C., 188, and other cases, that the forcible taking of chattels from the owner is *per se* indictable as a trespass, without laying an assault or (268) other breach of the peace. The Court consequently

held, in *State v. Mills,* 13 N. C., 420, that an actual breach of the peace was not necessary to render such a trespass a crime. But we held at the same time, that to constitute it a public offence, it must appear to involve a breach of the peace, or manifestly and directly tend to it: and therefore, that at the least, the taking must be in the presence of the owner, to his terror, or against his will. The Court is unwilling to extend the principle which has been adopted, and which must as yet be called new; or to weaken the limitation upon it which has just been mentioned, and was also acted on in *State v. M'Dowell,* 8 N. C., 449. A further relaxation would render it difficult to discriminate between a civil trespass and a criminal one.

Guided by previous adjudications, we are not, therefore, dissatisfied with the finding of the jury; and we approve the refusal of the Court to set the verdict aside. If the indictment need not charge a breach of the peace, it may, of course, be maintained by evidence which does not prove one. In this case, the evidence not only established the presence of the prosecutor, but the taking the horse from his corporal custody, and preventing the prosecutor from removing the horse, by threats of serious personal injury, and an attempt to commit it.

The indictment, however, does not allege a single one of those facts, nor any other from which either of them can be inferred. It merely lays the possession of the horse in the prosecutor, and charges that the defendant took him out of the possession of him the said A. B. H. This might be equally true, if the prosecutor were absent, since the owner is constructively in possession; and it was held in *Mills's Case,* 13 N. C., 420, that neither such a possession, nor "strong hand," import the requisite force; but that there must be other words to show the personal presence of the possessor, or in the language used in *State v. M'Dowell* to show "a violent taking from the *actual possession* of the person at the time."

(269) Hence, in the opinion of the Court, the judgment was properly arrested.

PER CURIAM. Judgment affirmed.

Cited: State v. Laney, 87 N. C., 537.

CHARLES HAMLIN v. JOSEPH J. ALSTON.

When two persons having opposing claims to certain slaves, both bail them to a third person, the possession of the bailee is not such a possession in either claimant as to divest the adversary title, whatever it may be, in the other; and the one who has the best right to the slaves, independent of the possession, will prevail in a suit for them.

Detinue for slaves. Plea, *non detinet.*

On the last Circuit at Halifax, a verdict was taken for the plaintiff, subject to the opinion of the Court, upon the following facts. The negroes in dispute originally belonged to the defendant, and upon the marriage of his daughter with John B. Mebane, had, with several others, been given by parol to the said Mebane. All these negroes continued in Mebane's possession from the time of the gift, in the year 1813, until his death in 1820. Mebane by his will gave them to his two children, Martha and Cornelia, then infants of tender years, and thereof he appointed the defendant an executor, and testamentary guardian to his children. During their nonage, the defendant, as their guardian, hired out the slaves annually. In the year 1831, the plaintiff intermarried with Cornelia, and the defendant then divided the slaves, and the notes he held for their hire, between the plaintiff and Martha; and in January, 1832, delivered to the plaintiff the share that fell to him. The slaves in dispute being a woman and a family of small children, the plaintiff left in the custody of his brother, William Hamlin, living near the defendant in the county of Chatham, and removed the others to his house in Halifax. The wife of the plaintiff died in the year 1832, and in January 1833, the defendant resumed the actual possession of all the slaves he had delivered the plaintiff, excepting those in dispute, which could not be readily removed from the house of William Hamlin. The defendant made an agreement with Wlilam Hamlin, to keep (270) them for one year for the sum of fifty dollars. Upon the resumption of the possession of the slaves, and the agreement between the defendant and William Hamlin being communicated to the plaintiff, he wrote to the defendant a letter dated 4 Jan., 1833, in which he submitted his claims to the defendant's sense of justice: and among other things, stated,

that if he, the defendant, did not think that he (the plaintiff), was entitled to the negroes, "I resign them to you" (the defendant) "as the lawful owner." About the time of this correspondence, the plaintiff informed his brother that he should claim the negroes in dispute to be in his possession, under his bailment to William, until that bailment was destroyed by the defendant's resuming the actual possession of them by carrying them to his own house. An agreement in all things similar to that above-mentioned, was made between the defendant and William Hamlin, for keeping the negroes during the year 1834 and 1835, and the defendant never removed the negroes to his own house until the latter part of the last mentioned year. If upon these facts, the plaintiff had such an adverse possession of the slaves as to complete his title under the act of 1820, (*Rev. c.*, 1055) then the verdict was to stand; otherwise to be set aside and a non-suit entered.

His Honor *Judge Bailey*, set the verdict aside, and directed a nonsuit to be entered; and the plaintiff appealed.

The case was submitted by *Badger* for the plaintiff, and *Devereux*, for the defendant.

RUFFIN, Chief Justice: The superior title of the defendant could be lost only by an actual possession adverse to him and continued for three years. We think with the Judge who tried the cause, that such a possession does not appear in this case. Although William Hamlin, as between themselves, might not have been allowed to withhold the slaves from the plaintiff, from whom he derived the possession, yet, for a like reason, he was under an equal obligation to surrender (271) them to the defendant. As between William and these parties, he was the bailee of each; and consequently *his* possession, as such, could not be adverse to either. It follows, that the plaintiff could not, by means of it, gain that which the defendant did not lose by it.

But the case does not depend only on the original relation of William Hamlin to the parties: it is yet stronger for the defendant. He not only claimed the slaves, and took the engagement of William to hold for him, but this claim and engagement were communicated to the plaintiff, and assented to by him. Upon receiving information of those facts, the

plaintiff wrote the letter dated 4 Jan., 1833. In that letter he does not assert a possession in himself: on the contrary, he disclaims the right, "resigns the slaves to you" (the defendant) as "the rightful owner;" and refers his interest to the liberality of the defendant. This terminated the obligation of William to retain possession for the plaintiff; and it was never re-assumed. The plaintiff, indeed, afterwards informed his brother that he should insist that the negroes were in his possession under his bailment, unless the defendant should personally take the actual possession from William; but the latter disregarded the notice, and ever after held, by express agreement, for the defendant alone.

We think it clear, therefore, that there has been no possesion by or for the plaintiff, which, of itself can constitute a title as against this defendant; and the judgment is affirmed.

PER CURIAM. Judgment affirmed.

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(272)

The Governor Upon the Relation of HENRY REVEL et al. v. PATIENCE REVEL, Adm'x of SOLOMON REVEL et al.

A legacy given to a wife during her coverture, but not paid to the husband during his lifetime, survives to her; especially where he joined her in a suit to recover it, and died before final judgment.

Debt, upon a bond given by the defendants, conditioned for the defendant Patience, well and truly to administer and distribute the assets of her intestate. After *oyer*, the defendants pleaded "performance."

The accounts of the defendant Patience were, under the usual order, referred to a commissioner to audit. He reported specially that Benjamin Sherrod, the father of the defendant Patience, during her coverture with her then husband, the intestate Solomon, died, having made his will and thereby given to her one undivided sixth part of the residue of his estate: that her husband, the said intestate Solomon, joined her and the other residuary legatees, in a petition, for an account of the estate of the testator, Benjamin Sherrod, and for the payment of their respective portions thereof: that

during the pendency of that suit, Solomon Revel, the husband, died intestate, and it was continued by his widow, the defendant Patience, who finally obtained a decree for two hundred and twenty-four dollars ninety-one cents; which was subsequently paid to her. The commissioner prayed the advice of the Court, whether this sum survived to the defendant Patience, or was assets of her deceased husband in her hands.

His Honor *Judge Nash,* at Wayne, on the last Circuit, upon these facts, directed the commissioner not to charge the defendant Patience with this money, which had been paid her by the executor of her father, after the death of husband; and from this order the relators craved and obtained an appeal to this Court.

W. C. Stanly, for the relator.

No counsel appeared for the defendants in this Court.

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DANIEL, Judge: In *Carr v. Taylor,* 10 Vesey, 578, the wife claimed a distributive share as next of kin to an intestate, who died while she was a *feme covert;* and the Master of the Rolls observed, that "whatever controversy there might have been upon the husband's right to sue in his own name for the *legal choses in action of his wife,* he could not sue for this *fund,* without joining her; and if he had obtained a decree for it in her right, and died before he had reduced it in possession, it would have survived." In *Garforth v. Bradley,* 2 Ves., 675, it was a legacy left the wife during the *coverture;* the husband died before it was reduced into possession; *Lord Hardwicke* said, it survived. He observed that, whenever a *chose in action* came to the wife, whether vesting before or after marriage, it would survive to the wife. In *Schuyler v. Hoyle,* 5 John Ch., 196, all the authorities on this subject were reviewed by *Chancellor Kent,* after an elaborate and able argument by counsel on both sides; he came to the same conclusion, that the distributive share survived to the wife. The plaintiffs' counsel argue and say, that the reason why the husband could not in England reach his wife's legacy or other property vested in trustees, was, that he had no legal interest, and was obliged to make application to chancery; the rule of which Court was, that he could not sue without joining her

with him; and then the Court would make him provide for her, unless she consented to waive any provision. He says, that the policy of compelling the husband to make provision for the wife before he shall be permitted to recover her legacy or distributive share, has been repudiated in our Court of Chancery. And he contends, that as the reason for the rule has here ceased, the rule itself ought to cease, and that the husband should be permitted to sue and recover in his own name; and if he died, his executors and administrators should have the legacy, and that it should not survive to the wife: that all the property of the wife in possession and in action so far as comes within the jurisdiction of the chancery, ought to belong to the husband, to counterbalance the privileges given her over his estate by the legislature. In answer to this reasoning, we have only to say, that it has never been considered as in conflict with our policy, that the (274) *choses in action* which belong to the wife, whether legal or equitable, should survive to the wife if they were not reduced into possession by the husband during his life. The position that this legacy ought to vest in the husband, in analogy to the rule of law, which vests in him a legal chose in action, accruing to the wife during the coverture, is not accurate. For even at law if a husband does not elect to make a note his own by suing for it in his name, and alleging it to be given *to him* in the name of his wife, but sue for it in their joint names, it is taken to be her debt, and survives to her. Such is the state of this case. The decisions of the courts are, that they do survive. The judgment of the judge, was, in our opinion, correct.

This opinion will be certified to the Superior Court of Wayne, and the cause will there proceed.

PER CURIAM. Judgment affirmed.

Cited: Mardree v. Mardree, 31 N. C., 304; *Poindexter v. Blackburn,* 36 N. C., 288; *McBride v. Choate,* 37 N. C., 613; *Arrington v. Yarborough,* 54 N. C., 75.

JOHN HAMILTON v. SAMUEL SMITH.

1. In slander, the words are to be taken as having been used in their ordinary acceptation among those in whose presence they were uttered.
2. In an action of slander, transactions between the defendant and others, to which the plaintiff was in no way privy, are not admissible in evidence against the plaintiff.

This was an action on the case, for slanderous words, in which, on the trial before *Pearson, J.,* at Buncombe, on the last Circuit, it was proved, that during an altercation between the plaintiff and the defendant, in the streets of Asheville, the former called the latter a mean man; to which the defendant replied, "If I had cooped as many hogs as you have been guilty of, I would not say *'mean,'* to any man." Upon the plaintiff's asking what was meant by that observation, the defendant replied, "I mean that you cooped four of my hogs; and there is a man," (pointing to one Murray, a bystander) "I can establish it by." Murray observed, "Smith, you are mistaken, it was Jones; and Hamilton had
(275) no hand in it:" to which the defendant replied, "Damn him, I believe he had." It was in proof, that several years before, the defendant drove hogs to the south, and in so doing passed by the plaintiff's house: that in a few days he returned and told Murray that he had lost four hogs, and asked him to aid in looking for them: that after much investigation, it was discovered that Jones had taken the hogs, and killed and cured them. No connection in this transaction was proved between the plaintiff and Jones. The defendant took the note of the latter with surety, for the value of the hogs. The defendant offered to prove that Jones had paid off this note in counterfeit bills; and that he, the defendant, was much provoked at this additional instance of dishonesty; but the testimony was rejected by the Court.

His Honor charged the jury, that if they believed that the defendant, in the altercation in Asheville, meant to charge the plaintiff with stealing his hogs; and that the words used on that occasion, would, in their ordinary acceptation, convey that idea to those in whose presence they were spoken, the plaintiff was entitled to a verdict. The jury returned a verdict accordingly; and the defendant appealed.

No counsel appeared for either party in this Court.

GASTON, Judge: An exception has been taken to the charge of the judge, because he instructed the jury, that if, from the evidence, they were satisfied that the defendant meant to impute to the plaintiff the crime of having stolen his hogs, and that the words used by him did, according to their ordinary acceptation, convey that imputation to those in whose presence they were spoken, the plaintiff had made out his case, and was entitled to a verdict. We hold that this instruction was correct. Whatever may have been the rule which prevailed in ancient times, it has long since been settled, that in actions for defamation, words are to be construed by the *Courts* in the plain and popular sense in which the rest of the world naturally understand them, if the jury be satisfied that the defendant used them in the defamatory sense imputed. We are also of opinion, that the evidence of- (276) fered by the defendant and rejected by the Court, with respect to the transactions between the defendant and Jones, with which transactions the plaintiff was not shown to have any connection, was altogether irrelevant to the matter in issue between the plaintiff and the defendant, had no tendency to explain the sense in which the defendant used the defamatory language spoken of the plaintiff, and was therefore properly rejected.

PER CURIAM. Judgment affirmed with costs.

Cited: Jenkins v. Cockerham, 23 N. C., 312; *Briggs v. Byrd,* 33 N. C., 355; *Sasser v. Rouse,* 35 N. C., 146; *Pugh v. Neal,* 49 N. C., 369.

JESSE CARTER v. GEORGE L. WILSON.

An entry in a cause pending in Virginia, whereby, by the consent of parties, the suit is dismissed, and the defendant adjudged to pay the plaintiff his costs, not being in that State a bar to a subsequent suit for the same cause of action, is not so here: neither is the entry of the payment of the costs, in the absence of all other proof, evidence to support the plea of accord and satisfaction.

After the new trial awarded in this cause, at Dec. Term, 1835, (18 N. C., 362) it was tried again at Caswell, on the last Circuit, before *Dick J.*

The plaintiff declared for a breach of a covenant warranting a slave to be sound. The pleas were, 1st, *non est factum.* 2nd, Arbitrament and award. 3d, An accord and satisfaction, averring an agreement by the plaintiff to accept seven dollars and seventy-six cents from the defendant, for the damages incurred by the breach assigned; and a payment thereof by the defendant; and an acceptance by the plaintiff as a full satisfaction. 4th, A former judgment for the same cause of action in favour of the plaintiff. 5th, A similar judgment in favour of the defendant. The plaintiff replied *nul tiel record* to the fourth and fifth pleas, and took issue upon the others.

On the trial, the defendant, upon his pleas to the Court, offered a copy of the record of a suit for a breach of
(277) the same covenant declared on in this action, in the Court of Pittsylvania county, Virginia, in which, after the declaration, plea, &c., there was the following entry; "by consent of parties, it is ordered by the Court, that this cause be dismissed; and that the defendant pay to the plaintiff his costs by him in this behalf expended." From the copy it also appeared that the costs had been taxed to seven dollars and seventy-six cents, and had been paid by the defendant. It was insisted, for the defendant, that this entry satisfied either one or the other of the 4th and 5th pleas. To repel this inference, the plaintiff produced and read the depositions of two gentlemen of the legal profession in Virginia, who stated, "that by the laws of Virginia, the entry of dismission aforesaid, does not amount to a *retraxit;* nor is it a judgment in favour of either party, so as to bar a subsequent suit for the same cause of action;" and for this opinion they referred to the case of *Coffman v. Russell,* 4 Munf., 207.

His Honor adjudged, that there was no such record as those stated by the defendant in his fourth and fifth pleas. The counsel for the defendant then requested the judge to instruct the jury, that the entry, and the taxation and payment of the plaintiff's costs, supported the plea of an accord and satisfaction; but his Honor declined giving this instruction. It was then insisted, that it was *prima facie* evidence in support of

that plea, and unless it was repelled, that the jury ought to find for the defendant upon the issue joined on it; but his Honor ruled differently; and a verdict upon all the issues submitted to the jury, having been found for the plaintiff, the defendant appealed.

J. T. Morehead and *J. W. Norwood,* for the defendant.
W. A. Graham, for the plaintiff.

GASTON, Judge: This cause was formerly before us on the appeal of the plaintiff, (18 N. C., 362) when the judgment rendered in the Superior Court was reversed, and the cause remitted to that Court for a second trial. Upon that trial, the issues were found for the plaintiff, and judgment rendered in his favour; and thereupon the de- (278) fendant appealed to this Court.

One of those issues arose on the plea of the defendant of a former judgment rendered in the Superior Court of Pittsylvania, in the state of Virginia, in an action between the same parties, for the same breach of covenant now complained of by the plaintiff. To this plea the plaintiff had replied *nul tiel record.* On the trial, the defendant introduced the transcript of a record from the Court of Pittsylvania, whereby it appeared, that the plaintiff therein declared against the defendant for the same breach of covenant; that the defendant by his plea denied the breach, and issue being joined "by consent of the parties, it is ordered by the Court that this cause be dismissed, and the defendant do pay to the plaintiff his costs by him in this behalf expended." The Court being of opinion that the entry or order aforesaid was not a judgment rendered for either party upon the matters then in suit between them, adjudged that there was no such record as that alleged in the defendant's plea. The correctness of this judgment depends entirely upon the effect which, by the laws of Virginia, is given to such an order of dismission. It appears from the testimony of two attorneys and counsellors of law in that state, which is made a part of this case, that it is not there regarded as a judgment; and that it is understood to have been decided not to have the effect of a judgment, by the Supreme Court of Virginia, in the case of *Coffman v. Russell,* reported in 4 Munford, 207. We have examined the case

referred to. It is not precisely in point, but authorizes, we think, the opinion expressed by these gentlemen, that the order or entry now under consideration, by the laws of Virginia does not amount to a *retraxit;* nor is it a judgment in favour of either party, so as to bar a subsequent suit for the same cause of action.

The defendant in this case had further pleaded, that before the institution of this action, the defendant had paid to the plaintiff, the sum of seven dollars, seventy-six cents: and the plaintiff had received the same in satisfaction and discharge of the damages sustained by the plaintiff by reason of
(279) the breach of covenant complained of. Issue being joined on this plea, the defendant exhibited to the jury the transcript of the record from Virginia, by which it further appeared, that after the order of dismission, the costs of suit had been taxed to the sum of seven dollars seventy-six cents; and the same were accordingly paid by the defendant. It was thereupon prayed by the defendant, that the jury should be instructed, that the matters so appearing on the record aforesaid did show an accord and satisfaction which barred this action. The instruction being refused, the defendant then prayed of the Court to instruct the jury, that the same were *prima facie* evidence of an accord and satisfaction, and entitled the defendant to a verdict on the issue, unless such *prima facie* evidence was rebutted by proof. The Court refused also to give this instruction. We are of opinion, that there was no error in refusing these instructions. There certainly appears on the Virginia record an agreement between the parties, that the defendant should pay the costs of the suit so dismissed; but we cannot see on it an agreement that the same should be paid in *satisfaction* of the *damages* incurred by the defendant's breach of his covenant. Costs are a part of damages, when the term damages is used in its more general sense, and are distinct from damages when the word is used in its restricted or relative meaning. In judicial entries, "costs" imply the mere expenses of the action, and not the damages complained of in the plaintiff's writ and declaration, but when awarded to the plaintiff by the Court, are in addition to these damages. It may have been, that the parties agreed to compromise the plaintiff's claim, upon the defendant's paying the costs of the action; and thus con-

stituted the amount of these costs the measure of the damages he was to receive for the alleged breach of covenant. There is nothing on the record inconsistent with such an agreement, and either party was at liberty by extrinsic proof to show the full agreement between them. But no extrinsic evidence being offered on either side, the Court must presume that the parties knew that the order made at their request, amounted to no more than a discontinuance of the action, which left unimpaired the plaintiff's right to damages, (280) to be asserted, if he thought proper, in another action, —must intend them to have agreed for such a discontinuance, and could not infer, or instruct the jury to infer therefrom a further agreement, giving to the transaction an effect different from that which the law assigned to it.

PER CURIAM. Judgment affirmed.

Cited: *Bond v. McNider,* 25 N. C., 442; *Trice v. Turrentine,* 35 N. C., 215; *Carr v. Woodleff,* 51 N. C., 401; *Idding v. Hiatt, Id.,* 404; *Rollins v. Henry,* 84 N. C., 579.

MERRIT DILLIARD v. THOMAS CARBERRY.

When the Postmaster-General vacates a contract for carrying the mail, and transfers the route to another person upon condition of his paying the first contractor a stipulated sum, the first contractor acquires a vested right to such sum; and the Postmaster-General cannot subsequently discharge the second from its payment.

Assumpsit, in which the plaintiff declared against the defendant for the sum of four hundred dollars, being the price which he alleged that the defendant had agreed to pay him, for an assignment of the mail contract from Raleigh to Greensborough. Plea, *non assumpsit.* The case was submitted to *Settle, J.,* at Wake, on the Spring Circuit of 1836, upon a case agreed, stating the following facts:

The plaintiff was the contractor for carrying the mail from Raleigh to Greensborough, and the Postmaster-General being dissatisfied with his performance, had determined to remove him; and the defendant sought to have the contract given to him; but the Postmaster-General learning that the plaintiff

had been offered four hundred dollars for an assignment of it, refused to give it to the defendant, unless he would pay the plaintiff that sum, and also take at a valuation, his horses, stages, &c.; and this the defendant agreed to do. This arrangement was made between the defendant and the Postmaster-General personally, the plaintiff not being present. On the defendant's return from Washington City, he notified the plaintiff of the determination of the Postmaster-
(281) General, and of his, the defendant's willingness and readiness to comply with his engagement; and called upon the plaintiff to surrender the route, and submit his property on it, to valuation. In his reply, dated 12 March, 1832, the plaintiff refused to do this then, but stated that he should go to Washington, and if he could not get himself reinstated in the contract, he would be ready to make the surrender about the first of the ensuing month. A very angry correspondence passed between the parties, the defendant refusing, in consequence of his previous tender, and the refusal of the plaintiff, to pay the four hundred dollars stipulated for by the Postmaster-General. In consequence of an appeal to that officer to enforce the payment of this sum, he called for the correspondence between the plaintiff and defendant; and by a letter dated 20 July, 1832, he directed the latter to continue to carry the mail according to his contract, expressing his determination "to decline any further intereference in the case."

Upon these facts, it was insisted for the plaintiff, that he had a right to claim the four hundred dollars, by virtue of the agreement made for his benefit between the defendant and the Postmaster-General.

For the defendant, it was contended, that as the Postmaster-General had a right at his pleasure to terminate the plaintiff's contract, the agreement contended for, was not a contract with the plaintiff, but was only a matter of policy adopted by the Postmaster-General for the regulation of his department; and that he had an equal power to discharge the defendant from all obligation to obey the order. But his Honor being of opinion for the plaintiff, judgment was entered accordingly; and the defendant appealed.

Devereux, for the defendant.
W. H. Haywood, for the plaintiff.

GASTON, Judge: We are of opinion that there is no error in the judgment rendered below. There was an express promise on the part of the defendant to pay to the plaintiff four hundred dollars as a premium or bonus on the transfer to the defendant of the plaintiff's contract (282) for carrying the mail. The promise was in law made to the plaintiff, though required by the Post-office department as a condition precedent to the transfer of the plaintiff's contract. The letter of the plaintiff of 12 March contains no waiver of the plaintiff's right to this money. He was not *personally* present when the decision of the department was made, and when first apprized of it, insists on having a little time to go on to Washington, to see whether he can be permitted to retain the contract—but most distinctly states, that if the decision of the department is final, he will be ready to execute on his part whatever arrangements may be necessary in conformity to it. His letter of the 3rd of April, announces his return from Washington, and calls upon the defendant to execute the decision of the department. The subsequent letters between the parties plainly refer to the valuation of the horses, stages, &c., which the plaintiff had a right to insist should be taken by the defendant, and cannot be forced into a rejection, or waiver of the claim to this sum of money.

The plaintiff acquired a vested right to this money by virtue of this promise; and the department could not release the defendant from the obligation to comply with it. But we hold it clear that the department did not pretend to release the defendant. The letter of 20 July declares the determination of the department not to exercise its powers over the subject-matter in controversy—not to interfere with the controversy, either in behalf of the plaintiff or of the defendant. The parties were left by the department to the exercise of their respective rights.

PER CURIAM. Judgment affirmed.

(283)

RUFUS HAYWOOD, Adm'r of JOHN G. BLOUNT, v. EDMUND D. McNAIR.

An assignee of a promissory note or of a single bond, who takes it after it is due, is bound by any defence which existed against it and would be available if the action were brought in the name of the assignor; and this rule is not confined to defences affecting the note or bond transaction itself, but extends to a distinct and independent set-off.

Haywood v McNair, 14 N. C., 231, considered upon a second trial, and approved.

After the new trial granted in a case for the same matter between the same parties, at December term, 1831, (Vide 3 Dev. Rep., 231), the plaintiff submitted to a non-suit, and subsequently brought this action. The defendant pleaded specially a set-off of a debt due by David Barnes to him; and the only question was whether the plea was available against the plaintiff, he being the assignee of a bond made by the defendant to Barnes, which came to his, the plaintiff's hands, after it was due, and also after the set-off to which, as against Barnes, it was admitted the defendant was entitled, became due. The cause was submitted, upon a case agreed stating the facts of the former case, to *Norwood, J.*, at Edgecombe on the Spring Circuit of 1835, who gave judgment for the defendant; and the plaintiff appealed.

Badger, for the plaintiff.
W. H. Haywood, contra.

RUFFIN, Chief Justice: Perhaps it is not entirely consistent with principle that this defence should be sustained in a Court of law; and it certainly does not fall within the statute of set-off, strictly speaking. But it has been generally understood by the whole profession of the bar and of the bench, in this state, for a period as far back as our memories reach, that the assignee of a note over due took it upon the credit of his endorser and subject to all the equities of the maker against payment. It seems to have been decided in England, about the time the case between these parties was before the Court on a former occasion, that the endorsee is liable only to such equities as arise out of the note
(284) transaction itself, but not to a set-off in respect of a debt due from the endorser to the maker, arising out of

a collateral matter. *Burrough v. Moss,* 10 B. & C., 558, (21 Eng. C. L., 128). But so strong was the impression here, that the rule embraced all equities between the parties, or, to use the language of *Chief Justice Henderson,* all exceptions to payment, that on the former argument, the contrary was not contended; but the effort was to make out a paramount equity on the side of the plaintiff, upon the ground that the delivery to his agent was equivalent to an assignment under the circumstances. It is remarkable too, that in the case in the Court of the King's Bench, all the judges were at first doubtful, and two of them expressed themselves in favour of allowing a discount of the endorser's own note to the maker. This shows that the same notion prevailed there that did here, though finally they agreed in restricting the rules to the terms mentioned. But it may be asked, how *equities against the note,* unless they amount to payment, can be noticed at law, more than *equities* between the parties. The one seems to be as much against principle as the other. Equities against the note can only mean such things as would amount to a defence at law for the maker, if sued on the note by the payee and endorser. They can not include such defences as would be merely a ground of relief in a Court of Equity between those parties. We suppose that an agreement that a particular sum or demand of the defendant should be applied to the note, is an equity alluded to. It seems quite reasonable that the assignee should be bound by such an agreement. But upon what principle can it be done; and under what plea? The principle must be that the defence might have been made if the suit had been instituted by the endorser or in his name; and that he ought not to have it in his power to deprive the defendant of it by assigning the note. Within that principle falls every demand of the maker against the endorser, which, at the time of the endorsement, was available as a defence at law. As for the plea, it is enough to say, that if the facts constitute a bar, they may be brought forward in several appropriate ways according to the action. If that be assumpsit or debt upon a bill or note, *non assumpsit* (285) or *nil debet* will cover the case; because it cannot be implied that the defendant promised to pay the assignee more than he ought justly to pay to his assignor. If the action be debt on a bond (which is the case here) *non est factum* will

not admit the defence; and therefore it must be pleaded specially as is done here. It is admitted, that under the statute strictly, the plea of set-off admits the debt to the plaintiff on the record, and offers to set off against it a mutual demand of the defendant against him. But that will not prevent a plea of set-off which admits the debt to the assignor, and insists on a right to a deduction or set-off against it at the time of the assignment, which he offers now to set-off, provided those facts amount to a defence in law. The question depends upon the rights of the parties, and not on the mode of pleading. The latter is indeed evidence of the law as to the right. In the cases of bills and notes the question has always been determined on the general issue; and when the law made bonds negotiable and gave the assignee an action of debt, in which the general issue is confined to the execution and validity of the deed, the matter which in the other actions availed upon the general issue, must in this be sufficient in a special plea. Upon the justice of allowing the defence there cannot be much difference of opinion. When a debt falls due, the debtor ought to provide for the payment in money or counter demands. It is a presumption that he will do so; and that he has done so; and after it is due, that he has paid it, or is not bound to pay it. The dishonour of the note puts every one on his guard; and he who takes it in that state, without communication with the maker, takes it at his own risk, and ought to stand in the shoes of the former holder. Here, however, the endorsee received express notice from the defendant that he had an equity against the note, and wished to save himself from loss on his suretyship for Barnes by applying the money he might pay as surety, in discharge of this note; and after M'Nair had paid the debt as surety for Barnes to this same individual, he took an assignment of the instrument now in suit. Although the case does not expressly (286) state the fact, it is plain that Barnes was insolvent, and could not secure the plaintiff, nor indemnify the defendant, but to the extent of this bond; and each party was trying to save that much. A court of equity would, therefore, undoubtedly relieve the defendant; and it is not seen why, if a Court of law can do so in any case, it should not be done in this, since it is only giving the same defence against the note in the plaintiff's hands, that was valid and legal against

it at the moment of its leaving Barnes's hands. An assignee of negotiable paper before it is due, holds it above all objections, unless it be void by statute or unless he have express notice. It is but reasonable that an assignee of over-due paper should hold it as his assignor did; because the state of the paper is notice that there is a defence, unless the maker hold out the contrary. Upon such considerations probably, the judges inclined in *Burrough v. Moss* to sustain the defence; and they ultimately gave but one reason for not doing so, which is, "that the cases had not yet gone that length." Now, on that we have to say, that there have been many cases which have gone to the full extent with us on the circuits; and also a solemn decision of this Court between these very parties; and, therefore, we are not making a new precedent, nor introducing a new principle, and certainly not an unjust one. If there be an error at all, it is in allowing paper to be negotiable at law after it has been dishonored, which is too firmly established to be altered; but it cannot be wrong to protect the maker from the fraud of the holder, in assigning a note when the latter owes the former an equal or perhaps a larger amount, then due. The endorsee, although not designing to participate in the fraud, has no body to blame but himself, if the maker insists upon his defence; for the paper spoke for itself, and he purchased with his eyes open.

The result of our opinion is, that judgment was properly given upon the case agreed for the defendant, and it must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Turner v. Beggarly, 33 N. C., 334; *Wharton v. Hopkins, Id.,* 506; *Bean v. Baxter,* 47 N. C., 359; *Harrington v. Wilcox,* 53 N. C., 350; *Parker v. Stallings,* 61 N. C., 593; *Neal v. Lea,* 64 N. C., 680; *Harris v. Burwell,* 65 N. C., 586.

(287)

Den ex dem. DANIEL MATTHEWS et Uxor v. JOHN SMITH et al.

1. Where a mother and her illegitimate children resided upon different parts of the same tract of land, the latter, under a parol agreement for a conveyance from their mother, subject to a life estate in her, their respective possessions are consistent with her title; and however long continued no presumption of a deed arises from them.

2. Any disability in the owner is a circumstance to repel the presumption arising from long continued possession, although such disability may have arisen since the commencement of the possession.

This was an action of ejectment, tried before *Pearson, J.*, at Rutherford, on the last Circuit.

The lessors of the plaintiff deduced title in the feme lessor, as one of the heirs at law of Catharine Bailey, who purchased the land about the year 1800, and lived upon it until she died intestate, in the year 1811, leaving three legitimate and several illegitimate children. Of the legitimate children the feme lessor was one, and the other lessor had intermarried with her some time before the death of her mother.

The defendants set up title under a purchase made in 1833, from Augusta Bailey, an illegitimate son of Catharine Bailey, of a part of the land in dispute. For the defendants, it was proved, that the land, when purchased by Catharine Bailey, was in woods, and that she contracted verbally to convey to Augusta, and Martin Bailey, another illegitimate son, in consideration of improving the land, erecting buildings thereon, and supporting her during her life; all which they had done: and further, that they had settled and lived upon parts of the land. It was also proved that Catharine Bailey, while on her death-bed, expressed a wish that a small part of the land should be set apart for a helpless daughter. The defendants then proved that, soon after the death of Catharine Bailey, her children, including the lessors of the plaintiff, met on the land, and divided it between Augusta and Martin Bailey, except twenty-five acres which they allotted to the helpless daughter; and that the lessor, Daniel Matthews was the most active in making the division. Augusta Bailey continued to occupy the part assigned to him, till he sold to the defendants, when they
(288) took possession, and retained it until the commencement of this suit; and that from the year 1800, the les-

sors of the plaintiff lived in the immediate neighbourhood of the premises.

For the defendants, it was contended, that from the length of time and the other facts proved, the jury might presume a deed from Catharine Bailey, to her sons Augusta and Martin; and that as the presumption in favour of the deed had commenced during her life, it was not impeded by the coverture of the feme lessor. It was also insisted for the defendants, that as the lessor, Daniel Matthews, was present at the division of the land between Augusta and Martin Bailey, and took an active part in making it, that the lessors were estopped from setting up title during his life.

His Honor charged the jury, that when a man held possession of land for many years, claiming and using it as his own, a jury might, in the absence of other proof to repel it, presume a deed; but that in the present case, during the life of Catharine Bailey who lived on the land, neither the length of time, nor the possession of her sons, was sufficient to justify the presumption of a deed. That the feme lessor being, at the death of her mother, under coverture, and continuing so till the commencement of the action, was a circumstance to rebut the presumption which might otherwise have arisen, because the coverture put it out of her power to sue, unless she could get the assent of her husband. That the position which had been relied on, to wit, that a presumption which had commenced running, continued to do so, notwithstanding a subsequent disability, could not be supported. That such was the rule adopted by the statute of limitations, but it did not apply to the doctrine of presumption. His Honor also ruled, that the fact of Daniel Matthews having assisted in the division of the land was no estoppel to bar a suit in his lifetime. The jury returned a verdict for the lessors of the plaintiffs; and the defendants appealed.

D. F. Caldwell, for the defendant.
No counsel appeared for the plaintiff. (289)

GASTON, Judge: We do not perceive that any error has been shown in the charge of the judge to warrant a reversal of the judgment rendered for the plaintiff in the Superior Court.

The entire tract of land, of which that in controversy is a part, is admitted to have been the property of Catharine Bailey, to whom Frances Matthews, the feme lessor is an heir at law. There is no circumstance during the life of Catharine Bailey, raising, or tending to raise, the presumption of a conveyance to her illegitimate sons, under one of whom, the defendants set up title. It is true, that while she lived, these sons were settled on the tract, and made improvements thereon, but their mother, who held the legal title, resided thereon also. There is not only *no* evidence that their possession was adverse to her, but the evidence offered by the defendants shows that such possession was consistent with, and in subordination to her title. At the time of her purchase of the tract, she had promised, if they would improve the land, and support her during the residue of her life, to give the land to them. No time was named for the execution of this promise; and unquestionably, she had the whole of her life to perform it in. An occupation by the mother and the sons, taken after this purchase and promise, and continued during her life, must be regarded as one, in assertion of their respective rights; that is to say, by her as the owner of the land; and by them, under the assurance that they would become its owners. The declaration on her death-bed of a wish that a small part of the land should be set apart for a helpless daughter, is not easily to be reconciled with the supposition that she had actually conveyed the whole of it away.

Soon after the death of Catharine Bailey, the possession of these sons became adverse to the title of her heirs at law. The heirs met on the premises, and after alloting twenty-five acres to the helpless daughter, divided the residue of the tract between the illegitimate sons. But at the time of this division, the feme lessor was under coverture, and has since so continued, up to the institution of this suit. If, therefore,

(290) the presumption arising from adverse possession long continued, is to be regulated, as the counsel for the defendant insists it should be, in precise analogy to the provisions of the act of limitations, the presumption cannot be raised, because Mrs. Matthews was under disability during the entire period of such adverse possession. But we do not adopt this position *in extenso,* or without qualification. Presumptions of the kind now under consideration,

are indeed, principally, but not altogether artificial presumptions, drawn by the law itself, in advancement of certain principles of public policy and convenience, but they are also in part natural presumptions of mere fact. As legal presumptions, they are the means or instruments by which Courts are enabled to entend the requirements of statutes or positive rules of law, to cases falling within a like mischief, but not within their express operation; and thus considered, their extension is very properly governed by the analogies of such express requirements. But as presumption of fact, they must necessarily be open to the influence of all collateral circumstances, tending to confirm or repel the fact sought to be inferred. Thus it is clear, that a forbearance to require payment of the principal or interest of a bond for twenty years after it becomes due, raises a presumption that it has been paid; but this presumption may be raised by a forbearance for less than twenty years, combined with other circumstances, rendering the inference of payment probable; and the presumption raised by a forbearance for twenty years may be repelled by evidence that the debtor, had not the means or the opportunity of paying. *Fladony v. Winter,* 19 Ves. Jun., 196.

The objection of estoppel has not been pressed here, and for obvious reasons cannot be sustained. The judgment is affirmed with costs.

PER CURIAM. Judgment affirmed.

Cited: Duncan v. Hill, post, 294; *McKinder v. Littlejohn,* 23 N. C., 73; *State v. Holcombe,* 24 N. C., 216; *Warlick v. Barrett,* 46 N. C., 541; *Walker v. Wright,* 47 N. C., 157; *Long v. Clegg,* 94 N. C., 765.

(291)

Den ex dem. CHARLES DUNCAN et Ux., v. JOHN HILL.

1. The provisions of the act of 1777 (*Rev. c. 115, s. 14,*) requiring process to be returnable to the term next ensuing its *teste,* does not apply to commissions to take depositions which may be made returnable to any subsequent term.

2. Commissions to take testimony are issued at the instance, and for the benefit, of one of the parties, and he will usually make them returnable at the earliest day consistent with convenience. But if through laches or from a wish to delay the trial, he should not do so, the non-execution of the commission will be adjudged an insufficient reason for asking a continuance.

Ejectment, tried on the last Circuit at Buncombe, before *Pearson, J.*

The lessors of the plaintiff having made out a title in the *feme* lessor, the defendant produced a bond from her, dated in the year 1795, before her marriage, with a condition to make him a title before the year 1799. He then proved that he went into possession of the premises in dispute in the year 1803, and continued that possession until the commencement of this action, in the year 1834.

To repel the presumption which the defendant sought to raise from these facts, the lessors of the plaintiff offered in evidence, the deposition of one Sarah Williams, in which it was proved, that the bond was made while the feme was under age: that she was married before she arived at full age, and had immediately thereafter removed to the western country, where she had since resided; and that her coverture continued up to the time of taking the deposition. This deposition was objected to by the defendant, because it was not made returnable to the next term succeeding its date, but to the term next but one thereafter, leaving an intermediate term during which it was out, and unexecuted. This objection was overruled by the Court, and the deposition read to the jury.

His Honor instructed the jury, that although a deed might, in some cases, be presumed from long possession, this presumption might be repelled by evidence of infancy, coverture, non-residence, or the like; and that if they believed the facts

deposed to by the witness sworn under the commission, they were not at liberty to presume that a deed had (292) been executed to the defendant according to the condition of the bond to him.

A verdict was returned for the lessors of the plaintiff, and the defendant appealed.

No counsel appeared for the lessors of the plaintiff in this Court.

A. M. Burton, for the defendant.

GASTON, Judge: Upon the trial the defendant objected to the reception in evidence of the deposition of Sarah Williams, because the commission was not returnable to the term immediately succeeding that at which it bore *teste,* but to the next term thereafter. The Court is of opinion that this objection was properly overruled. The provisions in our act of 1777, ch. 115, sec. 14, do not apply to commissions. These are not embraced within the term "process," and were not intended or referred to in that section. In its most general acceptation, process comprehends all the proceedings between the parties to the suit, after the original, and before judgment, but usually it imports those writs which issue to bring persons before the Court, or to do execution. When used in the latter sense, it is divided into original, mesne, and final. The provisions in this section with respect to the term to which process is to be made returnable, are expressly confined to "original and mesne process;" they are made in the spirit of the common law, by which a cause is out of court, if in the case of *mesne* process a term be omitted between the teste and return; (*Parsons v. Lloyd,* 3 Wils., 341) and are extended by the legislature to *original* process, because with us it is generally a capias, and is therefore within the mischiefs requiring a like remedy. That commissions to take testimony were not intended in this section, is further manifested by the enactment, that such process shall be executed at least ten days before the beginning of the term to which it is returnable, and if made returnable or executed at any other time, or in any other manner, than by the act directed, it shall be adjudged void, upon the *plea of the defendant.* It cannot be questioned but that a commission may be executed (293)

at any moment before it is returnable, and its validity or invalidity cannot be brought before the Court by *plea;* and it is liable to objections either on the part of the plaintiff or of the defendant. The issuing of commissions is regulated by sections 39, 40 and 41 of the same act, in which they are not spoken of as process, but as mere delegations of authority to examine witnesses; and neither these nor any subsequent acts on the subject provide when they shall be made returnable. There is no *necessity,* which requires that they shall be made returnable to the next term. They are issued at the instance and for the benefit of one of the parties, and he will usually make them returnable to the earliest day consistent with convenience. If through laches, or from a wish to delay the trial, he should not do so, the non-execution of the commission will be adjudged an insufficient reason for asking a continuance. A positive requisition, that they should be returned to the first term, would, in the case of distant witnesses, render it often difficult, and sometimes impossible, to procure their testimony. We believe that the defendant's counsel is correct in his construction of the act of 1797 (*Rev. c.* 474, s. 5) which declares it unnecessary, for a clerk to affix a seal to process within his county; and that the act applies to commissions as well as process properly so called; but we think that this construction is justified rather by the equity of the act, than by its words. If a seal be not necessary to a writ where personal liberty may be endangered, *a fortiori,* it shall not be demanded in one of a less important character. But however justified we may be in holding that commissions were in the purview of the legislature when they used the term "process" in this act, we cannot force them within the act of 1777, because of the word process, where it is obvious that commissions were not contemplated.

The other exception taken by the defendant to the charge of the judge, that upon the evidence set forth, the jury were not at liberty to *presume* a deed from the lessors of the plaintiff, is also unfounded. Referring to the opinion in
(294) *Matthews v. Smith, ante* 287, upon the subject of presumptions, we will remark only, that in the present case, the presumption relied on rests *wholly* on the possession taken in 1803, when Mrs. Duncan was actually under the

disability of coverture, which disability continued up to the institution of this suit.

PER CURIAM. Judgment affirmed.

Cited: *Freeman v. Lewis,* 27 N. C., 96; *Ledbetter v. Arledge,* 53 N. C., 476.

REBECCA POSTON v. RUSSELL L. JONES.

1. In trespass for mesne profits, the record of the recovery in ejectment is conclusive evidence of the title of the lessor of the plaintiff at the date of the demise; but it is no evidence at all that the defendant's possession commenced at that time; or at any time bfore the commencement of the action of ejectment; and the fact of its having commenced earlier than the last mentioned time, must be proved *aliunde.*

2. The record of the recovery in ejectment, is conclusive in the suit for mesne profits, to establish the fact of the defendant's possession at the commencement of the ejectment; and it is also *prima facie* evidence of that possession being continued till the judgment and execution; but the defendant may, on the contrary, show that his possession terminated earlier than that time.

Trespass for mesne profits, tried at Buncombe, on the last Circuit, before *Pearson, J.* The plaintiff produced and gave in evidence the record of a recovery in ejectment, between the parties, of the same tract of land. In the ejectment, the demise was laid on the 1st day of January, 1830, and the trial was in October, 1833. The present action was commenced on the 1st day of February, 1834; and on the trial, the defendant offered to prove that he occupied and enjoyed the land one year only of the time included from the date of the demise, as laid in the action of ejectment, until the execution of the writ of possession; but the evidence was rejected by the Court; and a verdict was rendered in favour of the plaintiff, for the mesne profits during that time; and the defendant appealed.

(295)

No counsel appeared for either party.

RUFFIN, Chief Justice: It is one of the unanimous resolutions in *Aslin v. Parkin,* 2 Bur., 665, that the judgment in

ejectment concludes nothing more than the title of the lessor of the plaintiff, at the date of the demise; and that it does not at all involve the title anterior thereto, nor the commencement or duration of the defendant's occupation. In the case before us, the Superior Court allowed the plaintiff to recover damages for the whole time, from the day laid in the demise, up to that on which the writ of possession was executed, upon no other evidence but the record of the former recovery. This, we think, was erroneous; at least, as to the time from which the damages were to begin. The demise may be laid as of any day after the title of the lessor accrued, and long before the tenant entered; indeed, the ouster must be laid after the demise; and, although it is usual to lay it on the next day, it may be laid on any other, and is not traversable. Consequently, it is only necessary to prove on the trial, that the defendant was in possession at the commencement of the suit. The judgment is therefore no evidence, that the defendant began to occupy on the prior day laid as that of the demise; and it was error to leave it to the jury to establish that fact.

It seems to be equally clear that it is competent to the defendant to show by proof, first, when his occupation commenced; and, secondly, when it ended. As to the first, such evidence is admissible in answer to that necessarily adduced by the plaintiff *de hors* the record in ejectment. The record does not *establish* the second point more than it does the other, though it is evidence on it, while it is not on the other. It establishes the defendant's possession when the suit was brought, and from that it is inferable, that his possession continued until destroyed by the judgment and execution. But the inference may be answered by the fact; as, for example, that the defendant went out, and the lessor of the plaintiff went in, before suing the writ of possession, or pending
(296) the action; in which cases, certainly, the plaintiff ought not to have damages during his own enjoyment. The effect of evidence, that the defendant left the possession, must, indeed, much depend on the circumstances; and this exception states the nature of the evidence rejected so imperfectly, that the Court is unable to say whether that offered in this particular case tended to establish any legal ground for exonerating the defendant from full damages, that is to say, up to the serving the writ of possession. It merely states,

that he offered to prove, that he occupied but for one year, without stating when or why he left the possession, or who succeeded to it. Now, we cannot hold, that a person can intrude himself into the house of another, and that upon his leaving it, after suit, the owner must take notice that the possession is vacant, and that he may resume it, so as to restrict the damages to the day of the trespasser's going out. It lies, in reason, on the defendant to show, that he lost or gave up the possession under such circumstances as to relieve him from subsequent liability. In strictness, therefore, in reference to the period at which the defendant's occupation terminated, his exception is not sustainable in its present terms—for the want of any such circumstances. It is fortunate, however, for the purposes of justice, that the decision of the cause does not depend upon this part of the exception alone, since it is almost certain, from the other parts of it, that the Court meant to decide, not that the particular proof offered did not constitute a defence, but that the record of the ejectment precluded all proof upon the point. That, as a general proposition, we deem incorrect. An instance, in which it is apparently so, has been already given; namely, when the plaintiff actually resumed the possession. There are others, in which the same conclusion seems equally obvious; as if the defendant entered as the tenant for a single year of an adverse claimant, who would not, or did not renew the lease, but at the end of the year occupied himself; or if the defendant was evicted by force, by some third person. The annual value of the premises during the period of eviction is the measure of the plaintiff's loss; and, in general, is the measure of the defendant's gain and responsibility. But the de- (297) fendant may be responsible for more, as if, during his occupation, his acts lessened the value. So, he may not justly be responsible for so much, if he was unable, when he quit or was turned out, to yield the possession to the plaintiff; or was restrained therefrom by his relation to another, against whom the law affords the plaintiff immediate redress.

There must, at all events, be a reversal of the judgment for the effect allowed to the record as evidence, on the part of the plaintiff, of the period for which the damages were to be assessed. It does not prove any possession by the defendant

before the suit brought; much less does it carry it back to the day of the demise.

Judgment reversed, and *venire de novo*.

PER CURIAM. Judgment reversed.

THE STATE v. JESSE, a Slave.

An indictment upon the act of 1823, (*Taylor's Rev. c 1229*,) making an assault by a person of color upon a white female, with intent to commit a rape, capital, must charge the *assault* to have been felonious. Charging an assault, with intent "*feloniously to ravish*," is not sufficient.

The prisoner was tried at Craven, on the last Circuit, before *Nash, J.*, upon an indictment containing two counts, the first of which charged him with a rape; and the second with an assault with intent to commit a rape, upon the body of a white female. He was acquitted upon the first count, but found guilty upon the second, which was in the following words, to-wit:

"And the jurors aforesaid, upon their oath aforesaid, do further present, that Jesse, a slave, being a person of colour, late of the county of Craven, the property of Miss Sarah Green, on the 1st day of October, in the year of our Lord (298) one thousand eight hundred and thirty-six, with force and arms, at and in the county aforesaid, in and upon one Bransy Witherington, in the peace of God and the state then and there being, did make an assault; and her the said Bransy Witherington then and there did beat, wound and ill-treat, with intent to commit a rape upon the body of her the said Bransy Witherington, being a white female, and with intent her the said Bransy Witherington, violently, forcibly, and against her will, then and there feloniously to ravish and carnally know; and other wrongs to the said Bransy Witherington contrary to the form of the statute in such case made and provided and against the peace and dignity of the state."

On the part of the state, the assault, with intent to commit the rape alleged, was fully proved; but it was contended for the prisoner, that he was under the age of fourteen years at the time, and evidence as to this fact was laid before the jury,

both for him and the state. His Honor, after directing the jury to acquit the prisoner upon the first count, instructed them, "that if they were satisfied from the evidence, that the prisoner had committed the assault, as alleged in the second count, and with the intent to commit a rape upon the person of the prosecutrix, they ought to return a verdict of guilty on that count, unless the prisoner had succeeded in showing them that he was at that time under the age of fourteen years: that if they were satisfied such was the fact, they ought to acquit him on that count also. The Court further instructed them, that though this was matter of defence on the part of the pirsoner, yet if, upon the evidence before them, they had a reasonable doubt whether, at the time the crime was perpetrated, the prisoner was of the age of fourteen years, he was entitled in law to the benefit of the doubt."

After the conviction of the prisoner upon the second count, his counsel moved for a new trial, upon the ground that the Court had erred in instructing the jury, that the fact of the prisoner's being under the age of fourteen years at the time the crime was committed, was matter of defence to be made out by him. This motion being overruled, the (299) counsel then moved in arrest of judgment, because the indictment concluded contrary to the form of the statute; whereas, it was contended, that it should have concluded contrary to the form of the statutes. But this motion was also overruled; and judgment of death being pronounced, and execution awarded, the prisoner appealed.

J. H. Bryan, for the prisoner.
The *Attorney-General,* for the state.

RUFFIN, Chief Justice: The counsel for the prisoner deeming the points taken for him in the Superior Court untenable, has declined arguing them. This renders it unnecessary that the Court should notice them, further than to remark, that in our opinion, the prisoner has no cause to complain of the benignant and favorable manner in which his Honor put to the jury a point of fact in his defence, that was left uncertain upon his own evidence. The counsel has, however, pointed to an omission in the indictment, which he in-

sists, and the Court thinks, is fatal to the sentence passed on the prisoner.

The prosecution is founded on the statute of 1823, (*Taylor's Rev. c.* 1229) which enacts, "that any person of colour, convicted by due course of law, of an assault, with intent to commit a rape, upon the body of a white female, shall suffer death, without the benefit of clergy." The crime is thus created a felony; for not only those acts which are made felonies in the express words of a statute, but also all those which are decreed to have or undergo judgment of life and member by any statute, thereby become felonies, whether the word "felony" be omitted or mentioned. 1 Hale's P. C., 627, 641, 703; 1 Hawk. B., 1, c. 7, sec. 5.

The indictment charges that the prisoner "made an assault on, &c., with an attempt to commit a rape on the body of her, the said, &c., and with intent her the said B. W. violently, forcibly, and against her will, then and there feloniously to ravish and carnally know, contrary to the form (300) of the statute, &c." The objection is, that there is no application of the term "feloniously" to the act of assaulting.

The office of that term is to describe the offence. It denotes, at the instant of the doing of an act, the disposition of the accused in doing it; which constitutes the guilty will that renders the person criminal. It is therefore one of the constituents of the offence, and must be precisely alleged. It is necessary for another purpose; which is, distinctly and immediately to apprize the Court of the degree of punishment that may be inflicted, and will be demanded; and thus to regulate the mode of trial. Where, as in the present case, the act charged is a misdemeanor at common law, as well as a felony by statute, unless the indictment expressly denominate it a felony, it cannot be seen on the record, that the prisoner, although guilty of a felony—was accused and tried for the felony. Consequently, judgment as for the felony, ought not to be given.

Unquestionably, by the law of England, this epithet is to be annexed expressly, or by copulatives, to every act set forth as a constituent of the offence. If it be omitted, the defendant can be convicted only of a trespass or misdemeanor. 2 Hale, 171, 184; Hawk. B. 2, c. 26, s. 55. Mr. Chitty re-

marks, 1 Cr. Law, 242, that "traitorously," "feloniously," and the like, are terms which mark the color of the offence with precision, and are absolutely necessary to determine the judgment. Serjeant Hawkins, following *Lord Coke,* Co. Litt., 391, says that felony *ex vi termini*, signifies *quodlibet crimen felleo animo perpetratum,* and can be expressed by no periphrasis, or word equivalent, without the word *felonice.* Book 1, c. 7, sec. 1.

As the term, then, has no synonyme; as it described a peculiar disposition and intent, essential to the existence of crimes of certain grade; and as it determines the privileges of the accused on his trial, and the degree and consequences of the punishment, it admits of no substitute; and its omission must be fatal to the indictment, as one for felony.

From these observations it results, in our opinion, as was intimated in *State v. Moses,* 13 N. C., 452- (301) 465, that *felonice* is not dispensed with by the act of 1811, (*Rev. c.* 809) for whatever so materially enters into the constitution of the crime, as the intent, and likewise, has such important influences on the trial and judgment, must be substance. If it be said, that this indictment charges an assault made "with intent her, the said B. W. *feloniously* to ravish," and therefore that it must be a "felonious assault," by necessary intendment of law, the answer is, that although that be true, yet the prisoner is not charged *as for* a felony, and may not have been tried as for a felony; and therefore, ought not to have judgment for the felony. The very same terms are appropriate to an indictment for a misdemeanor at common law, according to the precedents. Cro. Cir. Com., 61; 3 Chit. Cr. L., 816; 6 Wentw., 394. On the other hand indictments under the stat. 18 Eliz., c. 7, charged that the accused "feloniously made an assault," as well as that he "feloniously did carnally know and abuse" a woman child under ten years of age. Cro. Cir. Com., 401.

Nor does the conclusion, "against the form of the statute," supply this defect. The authorities already quoted say that nothing can. But besides that general doctrine, it is laid down, that the indictment must explicitly state all the circumstances which constitute the definition of the offence in the statute, so as to bring the case within it, independently of the general averment in the conclusion. Fost., 423; 1

to the said Nash, afterwards to wit, on &c. at, &c. in consideration of the premises, and that the said Morris would re-deliver and return the said slave to him, the said Nash, undertook and then and there faithfully promised the said Morris to cause to be cured the said slave of his said disease or unsoundness, or otherwise to pay back and return to the said Morris the said sum of &c., so that the said slave by the said Morris to the said Nash paid, when he should be afterwards requested so to do: and the said Morris in fact saith, that he did then and there return and re-deliver the said slave to the said Nash, who then and there took, accepted and received the said slave."

The second count differed only in laying the promise to be subsequent to the return of the slave; and the breach assigned was that neither the intestate nor the defendant ever had procured the slave, or repaid the plaintiff the $265, price of him. The defendant pleaded *non assumpsit*; and upon the trial at Northampton, on the last Circuit, before his Honor Judge Bailey, the case appeared to be as follows:

The plaintiff being about to remove to the west, purchased the slave of the defendant's intestate for five hundred and eighty-four dollars, but it did not appear that there was any warranty of soundness, nor that the intestate had fraudulently affirmed the slave to be so. After the plaintiff had commenced his journey, the negro pulled up nothing from a corner of the house of one of his legs, upon which the plaintiff sent him back to the Vaughan's, his agent to be returned to the intestate. They informed of these facts, the intestate desired Vaughan to return the negro to him, and promised that he would either cure, or have him cured, or would otherwise secure the price. Vaughan sent the slave to the intestate, who placed him under the care of a physician. Upon examination, the cancer was found to be very extensive; and after an operation the intestate took the negro, whom, at the time of the trial, he still retained in the possession of the defendant. It was proved, that the disease very seriously affected the value of the slave; that after an operation, nitrous sometimes affected a cure, but such a result was unusual, and not expected. The negro was returned to the intestate in May, 1834; and the action was brought in November fol-

lowing, the intestate having died in the intermediate time.

Upon this case, the counsel for the defendant moved the judge to nonsuit the plaintiff, upon the ground that the promise, upon which the action was brought, was without consideration; but his Honor refused so to do. The counsel then prayed him to instruct the jury, that no breach of the promise was shown, because sufficient time to effect a cure had not elapsed, if the disease was curable, or to ascertain whether it was incurable. This instruction his Honor refused to give, but told the jury that the intestate was entitled to a reasonable time, within which to effect a cure of the negro; that if he neglected to attempt it, or if he attempted it, and, failing to succeed, gave up the attempt as (304) hopeless, or if the disease turned out to be incurable, reasonable time having elapsed for a cure if it were curable, then the plaintiff was entitled to their verdict.

A general verdict was returned for the plaintiff; and the defendant appealed.

Devereux, for the defendant, in addition to the exceptions taken in the Court below, moved in arrest of judgment, because there was no sufficient consideration for the promise of the intestate set forth in the declaration.

Badger, for the plaintiff.

GASTON, Judge: However clearly it is settled with us, that a judgment of nonsuit, when submitted to in deference to the opinion of the Court, may be reversed on appeal as erroneous, it has not been, and, we think, ought not to be held, that the refusal of the Court to nonsuit a plaintiff can be assigned for error. The Court is never bound to order a nonsuit, if for no other reason, because it cannot nonsuit a plaintiff against his will; and wherever the propriety of a motion for a nonsuit is at all questionable, the court ought to decline giving such a direction, and permit the cause to go on to a verdict. By exceptions duly taken, if the ground of nonsuit lie in the proofs, or by motion in arrest of judgment if it appear of record, the matter can be put, or is already put in the way for deliberate and final adjudication. In this case, therefore, we shall not examine, whether the motion for a nonsuit was well founded or not. It may be, that the

judge's opinion having been manifested, or supposed to have been manifested by the refusal of this motion, the defendant's counsel prayed for no instruction to the jury, in relation to the matters whereon he had made that motion. However that may be, the record states but one instruction prayed for, viz., whether sufficient time had elapsed between the promise and the breach declared on, to warrant the plaintiff's action?—and in the instruction given upon that prayer, we see no error.

But it is insisted for the defendant, that the judgment rendered below, must be reversed, because the plaintiff is not entitled to any judgment by reason of the insuffi- (305) ciency of his declaration. This objection is open to the defendant upon the record. The declaration contains two counts. The verdict is a general one, and so is the judgment; if therefore either of the counts be bad, the judgment is erroneous. The first count sets forth, that the defendant's intestate had sold to the plaintiff a certain slave as a sound slave, which was unsound and of no value; and that such unsoundness afterwards came to the knowledge of the plaintiff; and that thereupon in consideration of the premises, and that the plaintiff would return the slave to the intestate, he, the intestate, undertook and promised the plaintiff to cure, or cause to be cured, the said slave, or to pay back the price he had received; and avers that the slave was accordingly returned; that the slave has not been cured, but remains in the possession of the defendant, unsound and of no value; and that the price hath not been refunded notwithstanding demand was made therefor. The second count differs from the first only in laying the promise subsequently to the return of the slave, and setting forth as the consideration of the promise, the sale and discovery of unsoundness as aforesaid, and the return of the slave at the special instance and request of the defendant.

The point mainly relied on, in the argument by the plaintiff's counsel, was, that the intestate was under a moral obligation to reimburse the plaintiff, and this obligation constituted a sufficient consideration to make the intestate's promise binding in law. It was not contended, that he was under a legal obligation to make reimbursement; for the sale having been without warranty and without fraud, the vendee was

bound in law to bear the losses arising from defects in the thing sold. *Erwin v. Maxwell,* 7 N. C., 241. But it was insisted, that no man could keep with a safe conscience, the price of an article sold as valuable and afterwards found to be worthless; and that although the law, while the obligation to make restitution rests only in conscience, cannot interpose to compel performance of the duty, yet it will gladly seize on a promise to perform it, and uphold it as binding.
(306) It is always gratifying in the administration of the law to behold it enforcing the precepts of natural justice; but it cannot successfully undertake to compel the performance of *all* of them, even on those who have expressly assumed to perform them. There are many duties to our fellowmen, which an enlightened conscience recognizes, that are either too refined to be discerned, too indefinite to be prescribed, or too imperfect to be enforced by human institutions, or which are regulated by a standard of morals too high to be applied as an ordinary instrument for measuring legal obligations. Those duties which are plain, definite and positive, and which can be practically enforced in the business of life, are recognized as legal obligations, and an undertaking to perform them, is raised through the fiction of an implied promise. There is however a class of cases, where, although the moral obligation may be plain and perfect, and ordinarily a proper subject for legal enforcement, yet its performance cannot be compelled, because of some rule of public policy, and where therefore the law will not imply a promise. If, however, in these cases a promise be afterwards made, when the interdict shall have been removed, so that allowing legal validity to the promise, will not conflict with the rule, there is no longer a difficulty in enforcing it. Thus it is a clear moral obligation to return money which has been borrowed; and in general the law compels the performance of the duty. From principles of public policy, however, it will not enforce such an obligation against a feme covert or an infant, because it denies to the one the legal capacity to contract, and allows it to the other only to a very limited extent. But if after the feme covert becomes a widow and the infant attains full age, they distinctly and unequivocally promise to pay what they would have been bound to pay, but for the protecting and disabling rule at law, the promise is re-

garded as binding as it would have been, had there been no such rule. In these cases, the express promise gives an original cause of action, although there never was an antecedent legal obligation; not merely because there was a former moral obligation, but because there was a former moral obligation, which would have had legal efficacy, but for temporary causes removed before the new promise (307) was made. So if a certified bankrupt or one set at liberty after being taken by a *ca. sa.*, promise to pay his former creditor, or a debtor promise to pay a debt, the recovery of which is barred by the statute of limitations; the law will compel the performance of the promise, founded on the former obligation, because it was once a complete legal obligation, and it is distinctly and unequivocally re-assumed, when there is no rule of legal policy to forbid it. But it is believed that a promise, however express, must be regarded as a *nude pact,* and not binding in law, if founded solely on considerations, which the law holds altogether insufficient to *create* a legal obligation; and from which, therefore, it refuses to raise the *inference* of a promise against any person. (See note to 3 Bos. & Pul., page 249, and the cases there collected). The result of all the cases as summed up in the note referred to, is "an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded, never could have been enforced at law, though not barred by any legal maxim or statute provision." This summary expresses the rule, we think, with as much precision as can be expected on a subject, where there is an excess of nice learning, and upon which there have been many decisions which it is difficult to reconcile with each other. It has been adopted, we see, with approbation in the Supreme Court of New York, in a case analogous to the present—that of *Smith v. Ware,* 13 Johns, 257.

If we dismiss, as not constituting a sufficient consideration for the promise of the intestate, the supposed moral obligation incumbent on him to remunerate the plaintiff for his unexpected loss, we can see in neither count of the

declaration, any other matters averred constituting such a consideration. This is not an action to recover damages for an injury done to the plaintiff's property. It is not an action on mutual promises, but simply to recover a
(308) sum of money promised to be paid under certain circumstances; that is, if a cure was not effected. Now, in such an action, it is certainly the general principle, and we are not aware of any exception embracing the case before us, that the consideration necessary to support the promise, must be some act or omission beneficial to the defendant (or accruing to a third person at the defendant's request) or prejudicial to the plaintiff. *Johnson v. Johnson,* 10 N. C., 556.

No benefit has resulted to the defendant's intestate from being permitted by the plaintiff to incur the expense and trouble of endeavouring to cure the plaintiff's slave. No inconvenience or prejudice has been occasioned to the plaintiff. The slave has not been injured—it is averred only that he has not been cured. No loss of service is charged or can be presumed, for the declaration avers that the slave was worthless when the plaintiff put the slave into the hands of the defendant's intestate to be cured, and continues worthless.

Whatever, therefore, might be the character, in *foro conscientiae,* of the intestate's promise, in law it was without consideration and void. It is the opinion of this Court, that the judgment rendered below must be reversed, with costs to the appellant in this Court; and that judgment on the verdict must be arrested.

PER CURIAM. Judgment reversed.

Cited: Findly v. Ray, 50 N. C., 127; *Felton v. Reid,* 52 N. C., 271; *Fulke v. Fulke, Id.,* 498; *Andrews v. Pritchett,* 66 N. C., 388; *Carlton v. Byers,* 71 N. C., 334; *Oldham v. Bank,* 85 N. C., 244.

Den ex dem. KEDAR FELTON et Ux. v. JOSEPH R. BILLUPS.

Where land was devised by a grandfather to a grandson who would have succeeded to the grandfather's land in case he had died intestate, it shall, upon the devisee's dying without issue, descend to his first cousin on the part of his grandfather, rather than to a half-brother, who is not of the blood of the devisor.

This was an action of ejectment, submitted to his Honor *Judge Toomer,* of Perquimans, on the last Circuit, in the form of a case agreed, presenting the following (309) facts:

Josiah Rogerson died seized of the premises in dispute, in the year 1806, having made his will, whereby he devised them as follows. "I lend to my grandson, Obadiah Rogerson, a tract of land, that I purchased of," &c., (describing the premises in dispute), "three negroes," &c. "Now, if the said Obadiah Rogerson should live to arrive at the age of manhood, and beget heirs of his body lawfully, then the above property is to him and his heirs forever; if not, I give and bequeath the above mentioned property unto my son, Jeremiah Rogerson, to him and his heirs forever." The devisee Obadiah lived to attain manhood, and died without issue in the year 1836. Jeremiah Rogerson survived the testator, but died before Obadiah, leaving the *feme* lessor of the plaintiff, his only child. She is the grand-daughter of the testator Josiah, and the nearest relative of the devisee Obadiah, on the side of his grand-father, the testator, being his first cousin; and Obadiah would have been an heir of his grandfather, had the latter died intestate. The defendant is the half-brother, *ex parte materna,* of the devisee Obadiah, but is not of the blood of the testator Josiah.

His Honor gave judgment for the lessors of the plaintiff, thinking that Obadiah took only an estate for life, and that the limitation over to Jeremiah was good as an executory devise; and the defendant appealed.

Kinney, for the defendant.
Devereux, contra.

DANIEL, Judge: Josiah Rogerson was the owner in fee of the land in dispute. He made his will, and devised the

lands as set forth in the case. It is admitted by the parties, that the lessor of the plaintiff is heir at law both to the testator Josiah, and also to the ulterior devisee, Jeremiah Rogerson, in case he could in law, take the land as executory devisee. But if Obadiah Rogerson, (who would have been heir at law to the testator in case no will had been made) took the entire and absolute fee by the aforesaid devise, then the lessor of the plaintiff would be his heir on the (310) part of the father, the testator, being first cousin. And the defendant is the brother of the half blood, of Obadiah Rogerson *ex parte materna.* Let us suppose the case to rest upon this point: then the act of assembly, passed in the year 1808 enacts, "That on a failure of lineal descendants, and when the inheritance has been transmitted by descent from an ancestor, or has been devised by gift, devise, or settlement, from an ancestor, to whom the person thus advanced would in the event of such ancestor's death, have been the heir, or one of the heirs, the inheritance shall descend to the next collateral relation of the person last seized, who were of the blood of such ancestor." If Obadiah Rogerson obtained an absolute fee in the land, by the devise in his father's will, then, as he would have been heir on the part of the father to this land, in case no will had been made by the father, and he (Obadiah) dying without lineal descendants, the inheritance shall descend from him, not as from an ordinary purchaser, but it shall descend to the next collateral relation of the person last seized, (Obadiah) who were of the blood of the ancestor Josiah. The lessor of the plaintiff is that person. She is the next collateral relation of the person last seized, of the blood of the devising ancestor; and therefore, is entitled to the land. The defendant, is not of the blood of Josiah Rogerson, and has no title. Let this case be viewed in any of the ways presented, the plaintiff still is entitled to recover.

PER CURIAM. Judgment affirmed.

MARY BETHELL, et al. v. SAMUEL MOORE, et al.

1. The act of 1789, (*Rev. c. 303,*) requiring a will, when contested, to be proved by all the attesting witnesses, if to be found, is satisfied by proof of their handwriting, if they are out of the State, lunatic, or the like.

2. Where there are three attesting witnesses to a will, all of whom reside beyond the limits of the State, proof of the handwriting of two of them is sufficient to admit the will to probate.

3. A cancellation is *prima facie* a revocation; but if made with the intent of executing a new will, and that intent fails, the cancellation is conditional, and shall have no effect.

4. Cancellation of a will, by drawing lines across it, is an equivocal act; and, whether it amounts to a revocation, depends upon the intention with which it was done. This intent may be gathered from cotemporaneous acts of the testator; and where he cancelled his signature, and afterwards signed the will anew, and by a codicil attached referred to it; sealed the whole up together, and deposited it among his valuable papers, the jury may, from these facts, infer, that the cancellation was not intended as an absolute revocation; but made with the view to another will which was afterwards abandoned.

This was an issue of *devisavit vel non,* as to four scripts propounded as the will of William Bethell, tried at Caswell, on the last Circuit, before *Dick, J.* One of them consisted of several sheets of paper stitched together, and purporting to be a will executed at Natchez, in the state of Mississippi, in February, 1833; and was attested by Samuel S. Cartwright, Stephen Lanier, and John Kerr. To this paper there were two signatures and two seals: the first signature was cancelled by having lines drawn across it, thus, *W|il|li|a|m B|e|th|e|ll,* but was still legible: the second was immediately under the first, and was entire. The other three scripts purported to be three codicils, written on the same half sheet of paper, all bearing the same date, March, 1834, and attached to the first script. The plaintiffs proved that the subscribing witnesses all resided beyond the limits of this state, to-wit, Lanier in Alabama, and the other two in Mississippi; that after diligent search, no one could be found, who knew the handwriting of Cartwright; of which, therefore, no proof was offered. Evidence of the handwriting of Lanier and Kerr was offered, and, although objected

(312) to, was received. It was proved further, that both the signatures to the first script, were in the handwriting of the supposed testator; and three witnesses testified, that every part of the three scripts purporting to be codicils, including the signatures, was written by him; and that all the papers were found shortly after his death, sealed up in an envelope, and placed in his desk, among his valuable papers; and in all respects in the situation in which they were exhibited at the trial.

His Honor, upon this evidence, permitted the papers to be read to the jury; although objected to by the defendants. The first script was a formal disposition of the supposed testator's property. The first alleged codicil began as follows: "My reasons for making this addition and clause to my will, is as follows: I wish my will to remain as it does," &c. In several instances he repeated provisions, "as already given in the above will," or "to belong to them" (the legatees) "as willed." The second codicil contained the following clause: "the balance of the money to be divided as named in the within." The third codicil was unimportant, merely giving a negro to his wife for life.

The defendants produced the depositions of Kerr and Cartwright, who testified that Kerr wrote a will for the supposed testator in Natchez, in February, 1833, which was attested by them and Lanier: that the supposed testator was then sick, but of sound mind and memory: that his name was signed but once: that he did not at any time after that day, re-execute or republish that will before them; neither had they ever attested any other for him.

Upon this case, the defendants prayed his Honor to instruct the jury, that the cancellation of his signature by the supposed testator, was a revocation of the will first above-mentioned; and that it was not republished as to the lands of which the testator was seized, by putting his signature to it a second time, nor by the codicils; and that the latter were not so executed, as to make them a will of land. But his Honor declined giving this instruction, and charged the jury, that if they believed the testimony the script offered as

(313) the original will, to wit, that executed at Natchez, was well executed by the supposed testator; and that it was not revoked by his cancellation of the first signature

—if they could collect from the testimony, that the cancellation was made for the purpose of adding to the will, and not with the intention of revoking it. But if they should be of opinion, that the cancellation was made with an intent to revoke the will, then it was revoked thereby; and was not republished either by his signing it again, or by the due execution of the codicils. He further instructed them, that if they believed the testimony, they ought to find that the codicils were well executed to pass land, and this, notwithstanding they might find against the first script. The jury found the four scripts to be the last will of the testator; and the defendants appealed.

Badger and *J. W. Norwood,* for the defendants.
W. A. Graham, for the plaintiffs.

RUFFIN, Chief Justice: No question is made upon the three instruments which are wholly in the handwriting of the supposed testator. They are executed and proved in conformity to the act of 1784, (*Rev. c.* 225, sec. 5), and are effectual to pass the lands which they purported to dispose of, as well as personal estate. The instrument which was prepared in Natchez and executed there, is also a good will of personalty; for to that purpose the re-execution here by the second signature, and placing the paper with the others in the depositories of the deceased, are sufficient, although it had been previously revoked absolutely by cancellation. The only question therefore, is, whether the Natchez will is good as a will of lands. We think, upon the facts found by the jury, that it is.

There was sufficient evidence of search for the subscribing witnesses in this state, and of their residence in other states, to authorize proof of their handwriting, if they had been witnesses to any other instrument. We think the law does not place a will upon a different footing from other instruments in this respect. The act of 1789, (*Rev. c.* 308, sec. 1) requires that a written will with witnesses thereto, shall, if contested, be proved by all the living wit- (314) nesses, if to be found. The expression "if to be found" is not to be construed literally. It admits of exceptions, where the witnesses are incompetent, or their atten-

dance cannot be compelled. The reason in such cases is the same as if the witnesses were dead. The provision of the statute is but an adoption of the rule previously existing in England, upon the probate of a will upon an issue out of chancery; on which it is necessary to examine all the witnesses, because the heir is considered as having a right to evidence of his ancestor's testable capacity and intention, from every one of those whom the statute calls around a testator, as guards against fraud on him, and imposition on those who would legally succeed to his estate. But several exceptions have been established. The insanity of one of the witnesses excuses the non-production of him. *Berrett v. Taylor,* 9 Ves. Jun., 382. So, if the witness be abroad, or otherwise not amenable to the jurisdiction of the court. In *Carrington v. Payne,* 5 Ves. Jun., 404, and *Wood v. Stone,* 8 Price, 615, one of the witnesses lived in the West Indies, and his testimony was dispensed with, and proof of his handwriting received. The case of insanity is a strong illustration of the necessity for the construction of the statute, which we suppose to be correct. If that be admitted, the others follow upon a parity of reason. It is true, a commission might issue to take their depositions. But in a case like this, it would produce great delay, and be highly inconvenient. The witnesses live in different states, and could scarcely be expected to give useful evidence, without having the paper before them; and that ought not to be allowed to be sent abroad, but upon the utmost necessity. After all, the witnesses might refuse to testify; and the Court can do nothing more than ask them. It was not the intention of the legislature, that in such cases, the will should be lost. In *Hampton v. Garland,* 3 N. C., 147, it was held, that a witness who was disinterested at the attestation, but had become interested before the trial, need not be offered, notwithstanding our statute. The same thing was admitted in *Crowell v. Kirk,* 14 N. C., 355; and it was there laid down by
(315) my brother *Daniel,* that where an attesting witness to a will is abroad, it is sufficient, as in other instances of instrumentary proof, to give evidence of his handwriting.

The Court is also of opinion, that sufficient evidence was given to allow the paper to be read to the jury, although the handwriting of Cartwright, one of the witnesses, was not

proved. The signatures of the party deceased, and of Lanier and Kerr, two of the witnesses, were proved; and if they had been the only witnesses, it would have been sufficient; because the statute requires the attestation of but two witnesses. How it would have been in this case, if the parties had rested on that evidence, we do not say. Perhaps those who offered the will, were excused from more by their inability, upon inquiry, to find a person in this state, who could prove Cartwright's hand. But if not, the defect seems to be entirely cured by the evidence offered on the other side. They took the depositions of Kerr and of Cartwright himself, who testified to the sanity of the party deceased, and the execution of the paper as his will, which was duly attested by those persons and Lanier, and which was the only paper of the kind which either of those persons ever attested. By this evidence, every thing is proved, which is required—the capacity of the party and the identity of the instrument—and if the jury believed the evidence, they might find that the party deceased thereby devised.

The remaining questions made at the trial were, whether this instrument had been revoked; and if so, whether it had been republished. Upon the latter point, his Honor instructed the jury against the instrument, holding that it could not be republished, either by a second signature, or by the recognition of it as his will, in the codicils appended to it. The better opinion in England seems to be, that a paper duly executed according to the statute of frauds, incorporates into itself another paper, existing at the time, by such reference to it as identifies it beyond doubt. But all do not seem to be entirely agreed in that opinion. There are yet more doubts upon the power to incorporate or republish a previous paper, not in the handwriting of the party deceased, by reference to it, however clear, in a subsequent one, (316) written by the party himself, upon the words of our act of 1784, (*Rev. c.* 225, sec. 5) which require "*such* will, and *every part thereof*, to be in the handwriting of the person whose will it appears to be." In the present state of this case, however, the question does not arise, as the jury found in favour of the instruments generally, and the appeal was taken by the caveators. The Court therefore expresses no opinion on this point, but proceeds to the other.

The act of 1819, (*Rev. c.* 1004, sec. 1) makes a will revocable by another will in writing, or other writing declaring the same, or by burning, cancelling, or obliterating the same, by the devisor himself, or in his presence, and by his direction and consent. The statute does not define what is such a cancellation or obliteration as shall amount conclusively, to a revocation of a will. Burning, or the utter destruction of the instrument by any other means, are clear indications of purpose, which cannot be mistaken. But obliterating may be accidental or may be partial, and therefore is an equivocal act, in reference to the whole instrument, and particularly to those parts that are unobliterated. So cancelling by merely drawing lines through the signature, leaving it legible, and leaving the body of the instrument entire, is yet more equivocal, especially if the instrument be preserved by the party, and placed in his depository as a valuable paper. It may be admitted that the slightest act of cancellation with intent to revoke absolutely, although such an intent continue but for an instant, is a total and perpetual revocation; and the paper can only be set up as a new will. But that is founded upon the intent. Without such intention, no such effect can follow; for the purpose of the mind gives the character to the act. When, therefore, there appears what may be called a cancellation, it becomes necessary to look at the extent of it, at all the conduct of the testator, at what he proposed doing at the time, and what he did afterwards, to satisfy the mind whether that was, in fact, meant as a cancelling, and was to operate as a revocation immediately and absolutely, or only conditionally, upon
(317) the contemplation of something else then in view.

For although every act of cancelling imports *prima facie,* that it is done *animo revocandi,* yet it is but a presumption which may be repelled by accompanying or subsequent circumstances. *In the Goods of Applebee,* 1 Hagg., 143, a will was altered in pencil, with the view that another might be drawn up, and then the testator cancelled it, and delivered the paper to a person to have the new draft prepared but died before it was finished. *Sir John Nicholl* held that cancellation to have been merely preparatory to making a second will, and conditional only; and, therefore, not to be a revocation. Upon the same principle proceeds

the case of *Burtenshaw v. Gilbert,* Cow., 52, and others of that class, in which an express revocation by a second will is held not to destroy the first will, if the revoking will be itself revoked or destroyed, and the first preserved. *Onions v. Tyrer,* 1 Peere Wms., 343, is a still stronger case; for there, after executing the revoking instrument, the party cancelled the first will by tearing off the seal. Yet because it was apparent from the contents of the two instruments that the latter was intended to be a mere substitute for the former, and as that could not operate as a will for want of the necessary attestations, it was held that both the express revocation, and that implied from the cancellation did not effectually revoke the first will. The act was regarded as a dependent one, to operate upon the supposition that the second will was duly executed, and therefore was said to be on that condition. Consequently, in the event, it could not be absolutely a revocation. So, in *Hyde v. Mason,* 3 Eq. Cas. Abr., and cited by *Lord Mansfield,* in *Goodright v. Glazier,* 4 Bur., 2512, a testator executed his will, in duplicate, of which he kept one, and delivered the other to his executor. The testator made many and essential alterations in his own copy, and wrote another will, nearly corresponding to it as altered, but never completed it. Upon a commission of review, it was held that the testator made the alterations and obliterations only upon the design to make a new will, and as that was never carried out, the first should stand; and much stress was laid on the testator's letting the executor (318) keep his duplicate, as aiding the presumption that the first will was not to be absolutely destroyed, unless a second should be made. *Winsor v. Pratt,* 2 Brod. & Bing., 652, is another strong case. In it *Chief Justice Dallas* says, that "he takes the rule to be, that where a testator designs to revoke a former will by an instrument making new dispositions, he discovers only a conditional intention to revoke; in other words, his intention to revoke is so coupled in appearance with his new testamentary act, that unless he completes such testamentary act, he is not looked upon in law as manifesting a deliberate purpose of revoking. *The effect of cancelling* depends upon the validity of the second will, and ought to be taken as *one act,* done at the same time; so that if the second

will is not valid, the cancelling of the first being dependent thereon, ought to be looked on as null and inoperative."

These cases come up fully to that now before us. Supposing that we are to look upon the signature, though not effaced, as cancelled by the lattice lines through it, the inquiry remains, whether that was done with the intent to revoke the instrument, and if so, to do it immediately and absolutely. It may be admitted that the legal presumption is in the affirmative. Still there is enough here to go to the jury as evidence that the revocation was not self-subsisting, but was with the further view of making a new will, with alterations; and that the testator immediately changed that purpose, and preferred that his will should stand, and the alterations be introduced by way of codicil. It cannot be assumed, without any evidence to the point, that the crossbars were made over the signature at a different time from that of writing the codicils and signing all the papers. If done all at the same day, the intent very strongly appears. The party intended to dispose of his whole estate, as is clear from the codicils alone. In them he adopts the first paper in the strongest language. They are written on the same sheet, and are called "additions to his will;" and begin with the words "I wish *my will* to remain *as it is*, only," &c.; and there are subsequently other clauses of the like im-
(319) port. It is clear, likewise, that the testator intended that his estate should go according to the provisions of this paper; and we are to suppose, in the point of view now under discussion, that it cannot do so under the paper as a republished will. If so, the argument is almost conclusive, that the cancellation was not *animo revocandi*, definitively. As in *Onions v. Tyrer*, the estate was intended for the same persons: and, therefore, the revocation implied must be taken to have been on condition that a new will was made, or that the old one would be good as republished by signing it again, and by the codicils. As, in fact, the party did not make a new will, and it turns out in law, that the old one was not thus republished, the whole purpose to which the cancellation was preparatory, has failed; and, therefore, the first ought to stand, as unrevoked. The reference to it in the codicils, and the preservation of all under the same

sealed envelope, are much stronger than the circumstance relied on in *Hyde v. Mason,* of the testator not calling for the duplicate left with the executor. It is asked, why cancel, if not to revoke, in this case? But it may be asked in reply, why cancel simply to republish? For it is clear, that the party intended the property to go by the paper, either as being unrevoked or republished. If a republication was not intended (and it seems almost absurd that it should be) then the supposed revocation must have been with the view of making a new will; which was never carried out, and probably was instantly abandoned. If that be the truth of the case, the revocation referred to the making of a new will, and was not to take effect before the occurrence of the relative act, namely, the execution of a new and effectual will. The documents indicate this train of thought in the mind of the party. Intending a will with most of the provisions of the old one, but with some change, he at first purposed that the whole should be in one instrument; accordingly, he drew his pen across his name on the old paper. Then it occurred to him, that he might make the alterations by a codicil; and, from hurry, or to save the trouble of writing all over again, he determined to give that form to the instruments, and not to revoke the first will. Hence the beginning (320) words of the first codicil: "I wish my will to remain as it is, only," &c. It is the natural language of a person in his situation to himself. It is also a declaration to those who might find the paper after his death, that the apparent cancellation was not to be taken, as by itself it might be, to be evidence of a final revocation of that paper. 'The contrary being my meaning, I evince it to you by reinstating my signature, and by writing a codicil on the same paper, and therein saying that the first *is still my will,* and, therefore, never was definitely revoked.' In every point of view, therefore, we think the Court and jury were warranted in saving that the revocation of this instrument was not established by the evidence, and that the presumption of it was repelled.

Judgment affirmed; which is to be certified to the Superior Court of Caswell, that further proceedings may be had in the proper Court for the full probate of all these papers,

as being together the testament and last will of the testator, to pass his personal and real estate, therein disposed of.

PER CURIAM. Judgment affirmed.

Cited: Edwards v. Sullivan, 30 N. C., 305; *In re Thomas,* 111 N. C., 413; *Cutler v. Cutler,* 130 N. C., 4, 6.

Den ex dem. ANDREW HOYLE v. LERAY STOWE.

1. A deed of bargain and sale made by an infant, is avoided by his executing upon his arrival at full age, another deed of the same kind, and for the same land, to a different person.

2. It seems, that to ratify a bargain and sale made by an infant, some act done, after full age, proceeding upon the notion that the estate created by the deed subsists, is necessary, as the receipt of the purchase-money, or the like. But if declarations be sufficient for that purpose, they must be clear and unequivocal, and made with a view to its ratification.

Ejectment for a tract of land, tried at Mecklenburg, on the last Circuit, before *Saunders, J.,* when the case appeared to be as follows:

Thomas Houston was seized in fee of the premises in the declaration mentioned, under the will of his father,
(321) subject to a term therein given to the testator's wife; and being so seized, conveyed the premises by deed of bargain and sale, to the lessor of the plaintiff, 19 Nov., 1827. Prior to that time, the defendant entered into possession of the land, under a lease from the widow, and was thus possessed on 10 Dec., 1828; and on this last day the defendant purchased the premises and took a deed of bargain and sale therefor, from the same Thomas Houston, who came to the age of of twenty-one years, in October, 1828. The term bequeathed to the widow having expired, the defendant continued his possession, claiming the fee under the deed of Thomas; whereupon this action was brought on 5 April, 1831.

On the trial, the lessor of the plaintiff objected to evidence offered on the part of the defendant, tending to establish the infancy of the bargainor when he executed the deed to him,

the said lessor; but it was admitted by the Court; and upon it the jury found that fact.

The lessor of the plaintiff then gave in evidence the depositions of Andrew Allen and of Mary Friddell. The latter, who is the mother of Thomas Houston, stated that she resided in Tennessee, and that her son was living with her until he came into North Carolina shortly before he sold and conveyed to Stowe: that when he was about setting out she heard him say, that Hoyle had paid him honorably for his land, and that he was solicited to sell it again; but that he then promised her that he would not. Allen stated, that the evening before Houston left home, he informed the witness, that he was solicited by some persons to sell his land again, and he asked his advice upon it: that to an inquiry of the witness, he answered, that he had once sold to Hoyle, who had paid him honorably, but those who solicited him to sell, wanted to make out to him, that he was not then of age. The lessor of the plaintiff also, gave further in evidence, that after Houston arrived in this state, he stated to a witness, that Hoyle had paid him a fair price for the land, and that he had spent the money; but did not say what he intended to do.

The counsel for the plaintiff's lessor thereupon (322) insisted before the Court and jury, that although the said Houston might have been an infant when he executed the deed to the lessor of the plaintiff, yet the defendant could not take advantage thereof in avoidance of the said deed: that the said deed was not void, but at most only voidable, by the act of the said Houston; and that he had done nothing whereby the same was avoided: and that the said deed, although originally voidable, admitted of ratification and confirmation by the said Houston, after full age; and that if the jury believed the witnesses who deposed to the acts and declarations of the said Houston, he did thereby recognize, ratify, and confirm the same, so that it could not afterwards be avoided by him, nor be impeached in this action.

The Court instructed the jury, that the deed to the lessor of the plaintiff was not void, although Houston might have been an infant at the time he made it: that it was voidable, and might be disaffirmed by him; and that he, and others succeeding to his right, might take advantage thereof: that

Houston could also waive the exception to the deed, which he might take on the ground of his infancy, and after full age might affirm and ratify it as his deed: but that the facts and declarations deposed to by the witnesses although occurring after the full age of Houston, and before he made the deed to the defendant, did not amount in law to an assent to, and affirmance of the said deed to the plaintiff's lessor, so as to disable the said Houston from conveying the premises to the defendant by the deed he afterwards executed to him. A verdict was given for the defendant; and from the judgment rendered thereon, the lessor of the plaintiff appealed.

A. M. Burton and *Badger,* for the lessor of the plaintiff.
D. F. Caldwell, for the defendant.

RUFFIN, Chief Justice, after stating the case as above, proceeded as follows: The plaintiff's objection to the evidence, and the first part of the instruction prayed by him, rest on the same position. It is, that the disability of infancy can be insisted on only by the infant himself, (323) or his privies in blood; and that a privy in estate cannot allege the infant's deed to be void. It may be true, that the infant or his heir alone can disaffirm his deed. It is his privilege; and until he shall treat the deed as void, or act upon a right to the estate as if a deed did not exist, third persons may not assume the privilege. But after the party has disaffirmed his deed by an act legally sufficient for that purpose, then his allienee, and indeed all persons, may treat the deed as null; for it is then all one, as if it never had existed. If this were not so, land once conveyed by an infant and resumed by him, would be forever after unalienable. His Honor, therefore, laid down the law properly, that the party to this deed might disaffirm it; and when that was done, that others might take advantage of the disaffirmance.

The remaining questions are, whether the deed to Hoyle was in this case disaffirmed and avoided; or whether it was ratified or confirmed.

Before proceeding to discuss these points, it is to be first observed, that in the Superior Court, an important proposi-

tion was yielded to the plaintiff; which is, that the deed in question was only avoidable and not void. That is the doctrine of the case *Zouch v. Parsons,* 3 Bur., 1794, and has been subsequently recognized upon the authority of that case. But the point does not seem to be at rest. It involves much learning, and there will be found on it, an irreconcilable conflict of opinion among judges and jurists of great eminence. While some deeds of infants are agreed on all hands to be void, and it is said that others are voidable, it is seen that those who hold the latter opinion, differ as to the principle which prevents them from being null *ab origine:* it being held by some, to be the solemnity of the instrument; by others, the delivery of the thing conveyed by the infant personally; and by others, the apparent benefit or disadvantage of the infant. It is not proposed to go into this discussion; for the decision of the question is not necessary to the decision of this case. It is not, indeed, readily apprehended what is meant, when it is said that a deed of bargain and sale by an infant, is only voidable. It may be that it is not void in the sense, that the other contracting party (324) or strangers can so treat it; or in the sense, that it admits of confirmation by some method or other at the full age of the bargainor. But it is a different question, whether as against the bargainor himself, or those in privity with him, it is not to be regarded as inefficacious until it be confirmed: whether the evidence of confirmation must not come from the bargainee, to cure the original defect of his title: or whether the evidence of the avoidance is to come from the other side to get clear of the deed as a conveyance? An entry will avoid a feoffment made by an infant. It is necessary, because the feoffment passes the land itself, whereby the feoffee gets a defeasible estate, and that must be divested before another can have such a right as is necessary to maintain an action for the possession. But a deed operating under the statute of uses, does not pass the land, but only the use; and the statute transfers the possession to such use as the contract of the parties raised. Now, an infant has not capacity, in the view of a Court of equity, to contract for the sale of his land; and his contract raises no use which can be there enforced. How, then, upon his bargain and sale, can he stand seized to a use, which the statute can execute? *Lord*

Coke lays it down, that a deed of an infant, operating under the statute of uses, will not pass the land, and may be avoided by the infant when he will; *for it is no effect to raise a use.* 2 Inst., 673. Then no act of the bargainor is necessary to revest his estate; for as between him and the bargainee, it never vested in the latter, nor was out of the former. If the bargainee were to bring trespass against his bargainor, the latter might give his infancy in evidence on not guilty or *liberum tenementum;* for it could be done in no other way. It is not perceived either, why the infant may not at once bring ejectment for the land, without a previous disaffirmance *in pais;* for the thing to be avoided is not as estate, but simply the deed. If an infant be sued on his bond, he disaffirms it by plea simply. If he sells personal chattels, he disaffirms the whole contract, whether by delivery or by deed, by suing for the chattels; which is the constant course. (325) It is otherwise in the case of land, when the conveyance operates by way of transmutation of the possession. But a deed of bargain and sale is out of the reason of that. Upon principle, therefore, it would seem that ejectment on an infant's bargain and sale cannot be maintained against the bargainor, or one in possession under him, unless a confirmation after full age be shown; as without it, the lessor's title is in itself defective. The reasoning in *Zouch v. Parsons*, tends to the contrary; though the particular point decided, may stand with it. That was, that the infant heir of a mortgagee in fee might, after payment of the mortgage money, convey the premises by lease and release. When the case has been subsequently discussed, it has been generally allowed to be right on this ground, if no other; that by a modern statute the infant was compellable in the Court of Chancery to convey the land; and therefore, that one Court could not hold the act to be void, when voluntarily done, which, if not thus done, another Court would coerce. It is to be observed, however, that although the Chancellor would in such a case decree a conveyance, it is to be considered what species of conveyance would be proper, and that he ought not to select one that upon its face would be ineffectual at law, unless prescribed in the statute. But it is certain that *Lord Mansfield*, and his associates, did not place the decision on that principle; but, on the contrary, treated it as a general

question on the capacity of infants to convey. To the general proposition, that an infant's deeds of bargain and sale, or lease and release, are not void as against himself, the foregoing doubts have been suggested. The most serious dissatisfaction with it has been indicated, not unfrequently, and judicially; and Mr. Preston in his able Treatise on Conveyances, p. 248, besides other respectable writers, has animadverted on it in a strain which is unusual in the profession. It is certain, at least, that the general reasoning in *Zouch v. Parsons,* is not, at this day, received as settled law. Its adoption or rejection is not indispensable in the case before us; and therefore, it has been deemed proper, while it is not denied, to let it be seen that an approbation of it is not to be inferred, as it might, from a silent acquiescence in the terms used in the instructions delivered to the jury. (326)

If this deed be only voidable, and admitted of confirmation, the Court is clearly of opinion, that it has been avoided by the making of the deed to the defendant, and had not been previously confirmed. It seems to be quite well established, that a deed of bargain and sale to another person after full age, is a complete disaffirmance and destruction, on the part of the bargainor, of his prior deed of the same kind, executed during infancy. No cases in the English books, directly in point, have been found. That of *Frost v. Wolverton,* Str., 94, is most nearly analogous. It was a fine, with a declaration of the uses by an infant; and after full age he made a second declaration of other uses. It was held, that the estate should go according to the latter. But in *Jackson v. Carpenter,* 11 John, 539, and *Jackson v. Burchin,* 14 John, 124, the Court of New York held that a second deed, as an act equally solemn and notorious as the first, was an effectual avoidance of it; and in one of these cases the bargainor was out of possession. In the case before us, the rule need not be carried so far. Here Hoyle was never in possession, actually or constructively; but the defendant had the possession under the lease from the widow, and took his deed while thus in possession. The bargainor therefore did all that he could do in avoidance of his first deed: which must suffice, since the deed was in some way voidable. In this respect, the case is like that of *Tucker v. Moorland,* 10 Pet., 59: in which *Mr. Justice Story* delivered the opinion of the

Court, and elaborately investigated all the questions debated before us, and came to the same conclusion on this point.

In the same case, the Supreme Court of the United States furnishes the authority of their judgment, "that if one after full age voluntarily and deliberately recognize a deed, which he made during infancy, as an actual conveyance of his right, or during a period of several months acquiesce in the same without objection, yet he may impeach it on account of
(327) his minority;" and may do so by thereafter conveying the land by bargain and sale to another person. It was held, that neither proposition insisted on by the plaintiff, is true; that recognition merely of the existence of the conveyance was not, itself, a confirmation, and *a fortiori,* that acquiescence could not be. It is singular, if a bargain and sale of an infant was deemed in England to be voidable only, that no decision of the courts of that country, or a *dictum,* can be found upon the question, what acts or matters will avoid it, or will constitute a confirmation, and impart validity to it. The cases of acceptance or payment of rent after full age, on a lease made during infancy, which are stated in the books as confirmations of the lease, do not cover the question raised by the record before us; for those are acts which in themselves are evidence of a tenancy, and, in the nature of an estoppel, create an interest in the other party. Even the receipt of rent by the wife, after the death of her husband, is a confirmation of a lease of her land made during the coverture. *Collins v. Weller,* 7 Term, 474; 2 Saund., 180, note 9. In those cases there is a benefit arising and received by a distinct act after the party is *sui juris.* In *Baylis v. Dinely,* 3 Mau. & Selw., 482, to a plea of infancy to debt on a bond with a penalty, it was replied, that after full age, the defendant ratified and confirmed the bond. On demurrer, the replication was held to be bad, because it did not set forth how or by what means the ratification was made; and *Lord Ellenborough* declared himself of opinion, that the requisite act of confirmation after full age, should be of as great solemnity as the original instrument. It may be doubted, then, whether any verbal declarations will suffice; or any laches or acquiescence, unless for so long a time, that the possession under the deed constituted *per se* a title. We find but a single case decided anywhere in the affirmative. But

that is one in our own courts. *Houser v. Reynolds,* 2 N. C., 143. It is shortly reported, and was, moreover, decided by a single judge at *Nisi Prius,* upon the authority of the cases on the acceptance of rent, cited from the common place books, which do not seem applicable, as has been already remarked. But admitting that case to be law, it is (328) only an authority where the declarations are directly between the parties to the deed, and contain an explicit recognition of the deed, and expression of the maker's satisfaction with it, as a conveyance. Nothing less, we think, ought or can suffice. Even the personal contracts of infants do not bind upon the mere recognition of them after full age, nor upon the acknowledgment that the debt is due; but only upon a ratification by express promise; or by an unequivocal act, from which the inference is certain, that a legal liability was meant to be acknowledged. Much less should loose and ambiguous words, from which inferences of opposite kinds may be drawn, uttered incidentally in casual conversations, and without deliberation, and without any view at the time of thereby confirming his previous voidable deed, deprive the person of his right in the realty. The conversations of Houston with Allen, and after he came to this state, are nothing more than acknowledgments of his having made a contract with Hoyle; without the least reference to any deed that he had made, or might have made; and expressly leaving it uncertain, whether or not he would acquiesce in the sale. The same may be said of the evidence of his mother, except that he promised her that he would not sell the land again. But she does not explain his reason, or her own, for wishing such a promise. It might have been, that she desired that he would not sell to any person, but keep his paternal estate; and that he assented on that account; which would imply an intention to disaffirm the contract with Hoyle. She may have wished him to complete the sale to Hoyle; and he may have replied as he did, merely to gratify her, and without an intention of fulfilling his promise. On the other hand, it is said that he might have had such an intention; and therefore it is insisted for the plaintiff, it should have been left to the jury *quo animo?* But the answer is, that it does not appear the mother knew that he had executed a deed: neither made any allusion to it. How, then, could this particular instru-

ment be thereby confirmed, as the son's deed? There
(329) is no evidence that the conveyance was in her mind, or in his; much less, that either intended what then passed as a ratification of it as a conveyance. In the cases cited from Johnson's Reports, the declaration of the bargainor to the second bargainee, at the time of executing the deed, that he had made the first deed twelve years before, and an acquiescence during all that time, were not deemed obstacles to the operation of the second deed, either as an act in avoidance of the first deed, or as passing the title to the last purchaser.

We think, indeed, that there ought to be some benefit arising to the bargainor, and distinctly received by him, after full age; or, at the least, a plain, positive, and express ratification, by declarations made with that view. We do not lay it down that this last, even, will do. It would rather seem, that there should be some act which, independent of the words, imports an estate or interest in the bargainee, or an acting in fulfilment of the contract, on which the deed was given; as if the bargainor purchase and take a conveyance for a part of the same premises; or receive a part of the purchase money after full age, or the like. But if declarations are in any case sufficient, those proved in this case have no tendency to establish the ratification of the deed, but could only mislead the jury. The Court therefore, properly told them, that they did not amount to an affirmance. After the clear act of disaffirmance shown on the part of the defendant, the *onus* was on the plaintiff to establish a previous ratification, or confirmation, as it is called. That he could not do by proof of declarations from which, by possible or strained construction, the ratification might ingeniously be inferred; but only by such as imported a present, express, and direct intent thereby to ratify.

PER CURIAM. Judgment affirmed.

Cited: McCormick v. Leggett, 53 N. C., 427; *Ward v. Anderson,* 111 N. C., 117.

(330)

MARCUS W. SMALLWOOD v. SAMUEL SMALLWOOD.

An acknowledgment or promise, to repel the statutes of limitations, must be distinct and explicit; and where the plaintiff's claims consisted of two debts, only one of which was barred, a letter from the defendant to him, as follows—"I do now, and have always appreciated your favors and kindnesses to me; and they shall not go unrewarded by me; but I shall want some little time to meet your demand."—is too vague to entitle the plaintiff to recover, as it may apply only to the debt which was not barred.

Assumpsit, in which the plaintiff declared, first, upon a promise by the defendant to pay as soon as he, the defendant, was able, averring his ability. Secondly, upon a promise to pay on request. Pleas, *non assumpsit,* and the statute of limitations.

Upon the trial, at Beaufort, on the last Circuit, before *Nash, J.,* the plaintiff proved that the defendant was indebted to him in two several sums, one for two hundred dollars, which accrued in the year 1830; and the other for five hundred dollars, due in the year 1833. The defendant proved a payment of the last, and relied upon his plea of the statute of limitations, as to the first debt. To repel this defence, the plaintiff read the following extract of a letter from the defendant to him, dated 19 Jan., 1836.

"Dear Brother: Having been engaged rather more than common, since my return, I have neglected to answer your letter. You say I have property worth twenty-five thousand dollars: I suppose this so, taking into consideration the present price of slaves. I do now, and have always appreciated your favours and kindness to me: they shall not go unrewarded by me; but I shall want some little time to meet your demand."

His Honor instructed the jury, that this letter prevented the statute from barring the plaintiff's claim for the two hundred dollars; that the word *demand* contained in it extended to every debt which the defendant, at the date of it, owed the plaintiff, whether consisting of one, or of several distinct sums: that from it, they had a right to infer the contents of the letter to which it was an answer; and if (331) they believed that the plaintiff's letter contained a demand for the two hundred dollars now in controversy, as

well as the five hundred dollars which had been paid, the answer took both sums out of the statute; and that it was the duty of the defendant to show them, that the promise contained in the letter of the 19th of January, 1836, did not extend to the two hundred dollar claim, but was confined to that for five hundred dollars. A verdict was returned for the plaintiff; and the defendant appealed.

W. C. Stanly, for the defendant.
J. H. Bryan, and *B. F. Moore,* for the plaintiff.

RUFFIN, Chief Justice: A slight examination of the reports discloses such a fluctuation of opinion upon the question presented by this case, that it is at once perceived to be impossible to lay down, what acknowledgment will or will not take a parol promise out of the statute of limitations, without coming in conflict with some previous adjudication, or, more probably, a series of adjudications. We shall not, therefore, pretend to go through the cases, either in an attempt to reconcile them, or to sustain our judgment by the authority of any of them, as being the best precendents. We think it sufficient to remark, that it is now a good many years since the Courts of England and of this country, generally began to regard the statute of limitations as a beneficial law, promoting repose, and necessary to secure individuals from stale demands; demands deemed by the legislature to be unfounded, simply because they are stale. It has therefore received a benign interpretation, with the view to its execution in its spirit. To insist on the protection provided in it, has not of late been looked on as an attempt to take an unconscientious advantage, and avoid the payment of a just debt, although in some instances it may be so; for the legislature, thought it so generally just, that they enable all persons to rely on the lapse of time as a bar. It is not then the duty of judges, as upright men, to withhold that protection, upon evidence, that possibly or probably, the debt had never, in fact, been paid. The principle of construction, (332) which takes a case out of the statute, upon inference or evidence of the probable subsistence of the debt, is absurd; since satisfaction was always an answer to the action, and the plaintiff ought to make out his case by more evidence

than will merely incline the scale to his side. The true principle of the statute is, that time is a presumption, and a strong presumption, of satisfaction. It is not a presumption of the very fact, to be deduced by the country; but it is a definite and positive legal presumption, declared by the legislature, and to be observed by the judiciary. To repel it, the plaintiff ought to give distinct and plain proof that the debt is unpaid; which, according to the statute, can be done only by showing, that *the promise,* on which the action is founded, was *made,* or *renewed,* within the time of limitation. In either case, the promise must necessarily contain, either expressly, or by plain implication, a distinct and explicit engagement to pay the debt, as stated in the declaration. This may be in terms either absolute or conditional. But still it must be a promise to pay, express or implied.

The great difficulty is in applying the rule to the evidence given. If the promise be express, that the defendant will pay to the plaintiff a particular sum of money due on a previous contract, there is a duty plainly undertaken, which can be enforced without the hazard of working injustice, or infringing the statute. But when the promise is not express, the danger of mistaking the meaning of the supposed debtor, and of departing from the intention of the legislature, arises, and presses itself upon the consideration of the Court. It is at this point, that the judges of later times have halted, and declined going all the lengths, to which their predecessors had proceeded. This Court has, in several cases, intimated, that we participated in the impression of our cotemporaries.

It is to be recollected, that every promise alleged in pleading, is alleged as an express promise, and must be, of course, so found. It may, indeed, be found upon evidence that is not what is called direct or express evidence; provided it satisfy the mind that the party did, at some time, expressly promise, as alleged. This is what is called a promise implied by the law. If the original undertaking was (333) more than three years before suit brought, the plaintiff, whether he declares on the subsequent undertaking, as a new and substantive promise, or on the first as a continuing promise—of which the latter is evidence—cannot support his allegation by subsequent declarations of the defendant, if, upon the whole, they contain a denial of his liability, and a

refusal to pay. It seems to us, therefore, although a person acknowledge that he contracted a debt, and that he has not paid it; yet if he at the same time insist that the statute of limitations exonerates him from liability, and upon that footing refuses to pay; that, in such cases, the bar of the statute is not removed. It cannot be implied that the party expressly promised to do a thing, which, it is proved, he expressly refused to do. If the same qualifying words were put into the declaration, every one would say, that in the pleading, they negatived the express promise, therein also contained, namely, the promise to pay. They are virtually placed on the record, when the defendant puts in no other plea but the statute, which need not contain even a protestation; yet on demurrer, or on verdict for the defendant, the bar is complete. It must be the same on evidence of such declarations.

So it would seem, on principle, it is if the language of the defendant is so vague, that it cannot be told with certainty to a common intent, whether or not he meant to renew or continue his original obligation; or to what extent he thereby meant to renew or continue it. For no inference of a promise can rightly be made from words which do not, at the least, import a willingness at the time, or an acknowledged liability to pay. The bare acknowlegment, that the debt was originally due, does not establish that it is still due. Nor even if he make the further acknowledgment, that he has not paid it, does it follow that he is willing and promises then to pay it, or has so done at any time after the first promise. The moral obligation is apparent, and is sufficient to sustain a new promise, or keep the old one alive, if re-acknowledged; but it constitutes or proves neither such new promise nor re-acknowledgment. For that purpose, there ought to be something that indicates an existing willingness or intention to pay, or to remain bound. In this case, (334) we are unable to discover any thing that plainly indicates such an engagement or intention. The words of the defendant's letter are, "I do now, and have always appreciated your favours and kindnesses, and they shall not go unrewarded; but I shall want some little time to meet your demand." In themselves, they do not import a promise to pay money. Judging of the contents of the

plaintiff's letter from that of the defendant, the former, in part, at least, may have been one of congratulation from one brother to another, at the recent propitious change in his circumstances. The reply acknowledges it to the extent supposed in the plaintiff's letter, and adds, that it is even greater. Then comes the sentence quoted. The terms of it denote a purpose to requite acts of personal friendship, and, it may be, of pecuniary aid, by something of the like kind. To reward kindness, or return favours, is not language usually applied to the payment of debts. That is all that is in this letter. There is no admission that the plaintiff had advanced money to the defendant, or for his use, much less an engagement to pay it. The latter part of the sentence is relied on by the plaintiff's counsel—"but I shall want time to meet your demand." So far from being in itself a promise to pay, it is a qualification of the previous part. It is saying, that even what I intend to do by way of "rewarding your kindness," I cannot now do.

But if this letter could be deemed a promise to any purpose, there is an insuperable difficulty in applying it to the debt now claimed, because it has no reference to, or connection with it, as far as we can discover. To what extent is the supposed engagement to be carried—that is, what debts shall it be taken to revive or create? It has been much disputed, where there has been an acknowledgment within three years, whether the action is to be on the new or the old promise. We have thought ourselves authorized to say, that it may generally be on the old one, as a continuing promise. But the doubt upon that question goes far to show what would be the nature of the acknowledgment, which preserves the original undertaking, and gives effect to it, as continuing. The form of pleading is a matter upon which there may be a different practice, without in- (335) jury, but it is most material to the rights of the parties, if an acknowledgment, to repel the statute, need not be the same with, but may be substantially different from one, on which, as a substantive cause of action, there could be a recovery. We think, that in each case, the acknowledgment must be in terms and meaning the same; and that it will not remove the bar of the statute, unless it might be laid in the declaration as a promise to pay the same debt, and to the same

extent as the plaintiff is now seeking to recover. Without such a restriction, all the mischiefs will arise, against which the statute was meant to guard, and persons may be ruined by strained inferences from loose conversations. Now, when it is said, that one person promised to pay to another his debt, the questions immediately present themselves—what debt? to what amount? These questions can be answered satisfactorily only by showing that a certain sum was mentioned, or that there was a reference to something which rendered it certain what debt, or what amount, the party had in his mind. It cannot include any thing that does not appear to have been referred to in it; for nothing but such a reference can explain what the person meant. Without it, the language is altogether indeterminate. Here, the expression is, "your demand;" without saying what that is; or how it arose; or how it may be ascertained. It is impossible to collect from these expressions, by themselves, what was the nature or amount of that demand. For that reason, no recovery could be had on it, if declared on as an original promise, unless there was other evidence, not given here, to establish what debt or debts in particular the writer then meant—that being the true criterion of the extent of his promise. It is not like a promise to settle accounts. That admits the amount to be uncertain, and engages to make it certain, in a particular way, namely, by computation; and to pay the balance to be thus ascertained; for a promise *to account,* is a promise to pay, as well as to adjust the balance by accounting. It is therefore an express promise to pay the balance; unless, as in the case of *Peebles v. Mason,* 13 N. C., 367, it be qualified by terms which deny that the balance appearing on the (336) accounts as they stand, is the true balance. In this case, the claims are altogether on the side of the plaintiff, and consists of three distinct demands; one, then barred by the statute; and two others not. Can it be said, with any certainty, upon this evidence, that the defendant referred to the first, under the word "demand?" Perhaps it might so appear, if the letter of the plaintiff, to which the defendant's was an answer, were before us. If that made a demand of this debt, doubtless the defendant referred also to it. But it is not before us, as neither party chose or was able to produce it, or prove its contents. They can be gathered only from

the reply of the defendant; and we see nothing in it from which the jury could believe, upon legal grounds, that there was a demand of this particular debt of two hundred dollars, on the part of the plaintiff. The general nature of the plaintiff's letter, as presumed from the reply, has already been adverted to. It is not probable, that a brother's congratulation should be immediately followed by a dun. That must, at the time, have been unnecessary, in the writer's opinion. At least, it would have looked ungracious, and more like felicitating himself, than his brother, on his accession of fortune. The term "demand" may therefore not have been used in reference to any debt of which payment was *requested* in that letter, but to the demand or claim his brother had on the writer, as a benefactor. But supposing the letter to have requested payment of some debt, can it be supposed to have entered into particulars, and stated each demand, with a view to fish out a promise to pay any particular sum or sums? If it had, the plaintiff would have taken care to retain evidence of the contents of the letter. At any rate, it lies on him to show that he did therein demand this debt, before it can be said that the defendant meant to include it in *that* demand. We think there is nothing to justify such an inference; but rather the contrary. Consequently, in our opinion, the plaintiff has failed to show that the defendant's acknowledgment had any reference to this debt; and therefore it is not taken out of the statute. It is in this point of view, like that part of the case on which is framed the count on a promise to pay when the defendant should be able. Such a (337) count is good, and such a promise might repel the statute, if the count were framed on the original undertaking, provided there was proof of the requisite ability. But in each case there must also be proof to show what debt, in particular, was mentioned, or referred to in the promise. It is not sufficient to give evidence that the defendant was indebted to several persons, and declared in general terms, that he meant to pay his debts; and when he got able, he would pay them. To make a promise sensible and binding, it must be shown, both that a debt existed, and that it was referred to by the party.

It may be admitted, that by connecting the terms of the defendant's letter with the facts which we learn *aliunde*, that

he had owed the plaintiff for moneys paid at several times to his use, we may suppose it not unlikely, that the plaintiff's letter proposed some arrangement for his satisfaction; and that this sum was mentioned with others; and, if so, that it might be inferred, that the defendant meant to assume all the advances, including this. But we think there should be plainly a promise, or a clear acknowledgment of liability, to take a case out of the statute; and that it should refer distinctly to the debt in question. Here the inference depends upon too many mere probabilities, more or less uncertain, to authorize its reception with any such degree of confidence as ought to be necessary to deprive the defendant of the positive protection of a statute. We think, in the language of the Supreme Court of the United States, "that if the expressions be equivocal, vague, and indeterminate, leading to no certain conclusion, but at best, to probable inferences, which may affect different minds in different ways, they ought not to go to the jury, as evidence of a new promise to revive the cause of action." Here, there are no clear terms of engagement to pay any debt; and certainly, not this debt in particular. Judgment reversed, and *venire de novo*.

PER CURIAM. Judgment reversed.

Cited: Mastin v. Waugh, post, 519; *McGlensey v. Fleming,* 20 N. C., 264; *Rainey v. Link,* 25 N. C., 377; *Sherrod v. Bennett,* 30 N. C., 311; *Moore v. Hyman,* 35 N. C., 274; *McRae v. Leary,* 46 N. C., 93; *Wells v. Hill,* 118 N. C., 908.

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(338)

HENRY B. ELLIOTT v. NOAH SMITHERMAN et al. Adm'rs of SAMUEL SMITHERMAN.

1. A memorandum reciting the assignment of a promissory note, and engaging to pay, on demand, a stipulated price therefor, is a negotiable security; and proof that the note, in consideration of which it was made, was a forgery, cannot be admitted against an assignee for value, who received it before its dishonor.

2. An endorsement of a note to a *bona fide* endorsee, made by the payee in a fictitious name, in which it was made to him, is valid, although the name was assumed for a fraudulent purpose.

ELLIOTT *v.* SMITHERMAN.

Assumpsit brought by the plaintiff as assignee, upon the following instrument, to-wit:

"This 27 April, 1835. Then received of William Long one note on Cornelius Shields and William Carr, for three hundred and fifty dollars, which I promise to give him two hundred and sixty four dollars twenty-five cents; and I have paid him sixty-four dollars twenty-five cents; and the two hundred I promise to pay him, the said Long, whenever he calls on me for it.—SAMUEL SMITHERMAN."

Which was endorsed as follows: "30 April, 1835. I assign the within note to Henry B. Elliott, value rec'd.

WM. LONG."

The defendants pleaded the "general issue," and specially that there had been no assignment of the note. Upon the trial at Randolph, on the last Circuit, before *Dick, J.*, the plaintiff having proved the execution of the instrument, the endorsement to him by the payee, and a demand after the endorsement but before suit, the defendant objected, that the note was not negotiable; and moved that the plaintiff be non-suited; which was refused. The defendants then offered to prove, that the note set forth as the note of Cornelius Shields and William Carr, was a forgery, and that, therefore, there was no consideration to the maker of the note declared on; but the Court rejected the evidence. The defendants further offered to prove that the person who signed the endorsement, and to whom the note was made payable by the name of William Long, was not in fact named William (339) Long, but had assumed that name with a fraudulent intent to defraud the intestate, or the plaintiff, or some other person, and that, therefore, the endorsement was a forgery: but the Court rejected this evidence also, and charged the jury, that the instrument declared on, was a negotiable note; and that if they believed it was executed by the defendants' intestate to a man calling himself William Long, and the same man endorsed it by the same name to the plaintiff, the latter had a right to recover; and this, although the endorser was not in fact named William Long, but had fraudulently assumed that name for the purpose of defrauding the maker, or the assignee, or any other person. Under these instruc-

tions a verdict was rendered for the plaintiff; and the defendant appealed.

Badger, for the defendant.
Winston, contra.

DANIEL, Judge: The first objection taken by the defendant to the charge of the Judge, is, that the instrument offered in evidence by the plaintiff, was not a negotiable note. We think that the instrument (though inartificially drawn) is a note for the payment of money absolutely and at all events, and therefore is negotiable. Chitty on Bills, 336. The case of *Chadwick v. Allen,* 1 Stra., 706, cited for the plaintiff, is very much like this case. Secondly, the defendant contends, that he should have been permitted to prove that the note was given by his intestate without any consideration, or that the consideration had failed. The note was executed 27 April, 1835, and concludes thus: "I promise to pay him, the said Long, whenever he calls on me for it;" and it was endorsed to the plaintiff on 30 April, 1835, who *bona fide* paid a valuable consideration for said endorsement before any demand had ever been made. There is no precise time in which a note payable on *demand,* is to be deemed dishonoured; but it must depend on the circumstances of the case. *Loose v. Duncan,* 7 Johns., 70; *Loomis v. Pulver,* 9 Johns., 224; Chitty on Bills, 129, 262-3 (note, 6 edition). When a check, or bill, or banker's note, is expressed to be
(340) payable on *demand,* or when *no time of payment is expressed,* it is payable instantly on presentment, without any allowance of days of grace; and the presentment for payment of such a check or bill, must be made *within a reasonable time* after the receipt of it. Chitty on Bills, 269, and note 345; *Freeman v. Haskins,* 2 Caine, 369. This note having been endorsed in so short a time as three days after its date, and before any demand of payment made, so far as can be collected from the evidence, it stands on the footing, we think, of a note endorsed before it is due; and that as the defendant's intestate had put it in the market, he is precluded from showing a want of consideration to himself, so as to defeat the recovery of the plaintiff, who is a *bona fide* holder. Chitty on Bills, 127, and the cases there cited.

The last ground taken by the defendant is, that he was prevented by the Court from showing, that the payee and endorser was not in fact named William Long, but had some other name; and therefore, (as he contends) the endorsement was a forgery, intended to defraud the maker, the plaintiff, or some other person. The answer is, that the maker of a negotiable note puts it in circulation, and when it is endorsed by the payee, he stands in the same situation as the acceptor of a bill of exchange; and it is no defence for an acceptor to an action by a *bona fide* holder, that the drawer's name has been forged. Chitty on Bills, 185, and the cases there cited. This note was made to a person, who represented himself as named Will. Long, and that identical person endorsed it to the plaintiff for value, in the name of Will Long. It therefore passed the title; and the plaintiff is entitled to recover of the maker's administrator. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Little v. Dunlap, 44 N. C., 41; *Bank v. Michael,* 96 N. C., 58.

(341)

CHARLES W. BAIRD v. ISAAC B. BRADY.

The statute of frauds of Virginia, making a possession of slaves for five years under a bailment, fraudulent, as to the creditors of the bailee, has no effect unless the full term of the possession takes place within that State: and where it commenced there, but was completed in this State, *it was Held*, that a purchaser under an execution issuing here against the bailee, acquired no title.

Detinue for three slaves. Plea *non detinet.*

On the trial before *Bailey J.,* at Edgecombe, on the last Circuit, it appeared, that the plaintiff, who was a resident of the state of Virginia, loaned the slaves in controversy in the year 1830, to one Lynch, his son-in-law, who also was then residing in Virginia. Lynch retained the possession of the slaves for four years in Virginia, and then removed to the county of Edgecombe in this state, where he remained with the slaves still in his possession, until the month of June, 1836. In that month the slaves were seized and sold

by the sheriff under an execution issuing upon a judgment obtained against Lynch in Edgecombe. A certified copy of the act of the General Assembly of Virginia, entitled "An act to prevent frauds and perjuries," was produced, and read to the jury. That act (see a copy thereof 14 N. C., p. 162) provides; among other things, that "where any loan of goods and chattels shall be pretended to have been made to any person with whom, or those claiming under him, possession shall have remained by the space of five years without demand made, and pursued by due process of law, on the part of the pretended lender, the same shall be taken as to the creditors or purchasers of the persons aforesaid, so remaining in possession, to be fraudulent within this act; and that the absolute property is with the possession, unless such loan were declared by will, or by deed in writing, proved and recorded."

Upon this case the judge instructed the jury, that the plaintiff was entitled to recover, as there was not five years possession of the slaves by the son-in-law in Virginia. A
(342) verdict was returned accordingly; and the defendant appealed.

The *Attorney-General*, for the defendant.
B. F. Moore, for the plaintiff.

RUFFIN, Chief Justice: The case does not involve the question, what operation is to be given here to a parol gift of slaves made in Virginia. If it did, there would be no hesitation in saying, that if it were effectual there, it would also be so here. But the instruction to the jury and the exception, both suppose the slaves to have been expressly loaned originally; and upon that supposition, it was laid down that the defendant did not get the title by his purchase at execution sale in this state.

The correctness of that proposition cannot be controverted upon any general principle of the law of contracts, as established in any country. Merely by force of the contract, an owner does not part from the title of his property by hiring or lending it. He may, however, lose it by a bailment under such circumstances as are deceptive on third persons, who would be injured if the property should not be liable on the

contracts of the bailee. On this latter ground, the exception in this case is founded.

By a statute of Virginia, it is enacted that a pretended verbal loan of goods to any person with whom possession shall have remained by the space of five years, without being honestly resumed, shall be taken as against the creditors of such possessor, to be fraudulent, and that the property is with the possession. The question is, whether a possession by the borrower for five years, begun in Virginia and completed in North Carolina, is to be deemed, in the Courts of this state, to be fraudulent as against his creditors. On behalf of the defendant, counsel has contended, that the case is within the statute: that its meaning is, that a possession for five years establishes that it was not acquired under a bailment, but under a contract for the absolute property: that it is but one possession throughout, and as the statute is conclusive that it was not throughout upon a loan, it must be referred to a contract at the beginning, for the title as well as the (343) possession: and that the Courts of this State will apply the statute, upon the principle that the *lex loci contractus* ought to govern.

The consideration of the objects and provisions of the statute of Virginia, leads so satisfactorily to the conclusion, that, upon a fair construction, it does not embrace the case at bar, that our judgment may be founded exclusively on that point; without embarrassing ourselves by inquiring what would be proper, if that statute did extend to it.

In the first place, it cannot be admitted that the act places the liability of the goods to the creditors of the possessor, upon the ground that the possession was not originally acquired upon a contract of loan, but upon one for the absolute property. If a contract for the property be at all within the purview of the act, as the foundation of the claim of a creditor of the possessor, that contract is not necessarily to be supposed to have been in existence at the time of the change of the possession. The provision is, that when there has been a possession for five years, "the absolute property *shall be taken* to be with the possession." Why so taken? Because there has been such long possession. When so taken? At the completion of that long possession, and not before. As the possession by the bailee or any under him, establishes the prop-

erty to be out of the bailor, then and not before; the period at which the supposed contract for the absolute property was made cannot be carried back to any particular previous point of time. The legislature indeed may suppose that the possession might have begun upon a secret contract for the absolute property. But that is not necessary to the purpose of the act. It is insufficient for the creditor if the property be taken to be in his debtor, at the period at which it is subjected to his debt; which is, at the end of five years. There is no legal necessity against supposing that the contract on which the possession was acquired, was for a loan; and that pending such possession there was a contract, by which the property also was acquired. It follows, even if the statute goes upon the idea that possession proves a contract for the absolute property, that it does not necessarily refer
(344) to the commencement of the possession as the period at which that contract was made; especially in a case in which it is proved that the possession begun expressly upon a loan. The possession in this case, therefore, is not evidence that the contract was for the absolute property, at any time anterior to the bringing the slaves into this state. If not, they then belonged to the plaintiff by the law of Virginia; and for that reason, by our law also; and they so remain still, so far as a contract is requisite to divest his title, because no such subsequent contract has been proved.

But in the second place, the statute of Virginia is of a character entirely different from that given to it in the argument. It does not proceed on the idea of a contract for the property, between the former owner and the possessor. If it did, the title would be in the possessor for every purpose; and yet it is so by the statute, only as to creditors and purchasers and that by reason of fraud. In *Watson v. Orr,* 14 N. C., 161, the Court had occasion to construe this statute in reference to this point; and held that it did not affect the parties as between themselves. It is a satisfaction to be now informed, that the Court followed the construction given to the act by the Courts of Virginia. We are then not to inquire what was the contract between the plaintiff and his son-in-law; but whether the creditors under whom the defendant claims, were deceived, or could be deceived by the acts of those persons. To that purpose it is immaterial whether

the plaintiff gave or sold the negroes to Lynch or not; for if the creditors have been deluded into the belief, upon grounds apparently reasonable, that he had, the slaves ought to satisfy them, although they were only lent, and not in fact given or sold. It is in fine, a matter of fraud, and not of contract. In that point of view, it seems impossible to say, that the statute covers the case. That part of the possession which occurred in North Carolina, was necessary to complete the period prescribed in the statute; and that part could not be deceptive on those who dealt here with the owner.

By the laws of most countries, the possession of personal chattels for a considerable time by one, using and treating them as his own, is fraudulent; because it (345) induces the world to deal with the possessor as the visible owner. The real owner is regarded as having intended the deceptions which actually occur; and therefore, is justly prohibited from resuming his property, and withdrawing it from the creditors of the possessor, to whom it is justly forfeited, as far as it is necessary for their satisfaction. This is the true principle of laws for the prevention of fraud. Whatever may have been the contract between the parties, and admitting it to have been a loan; yet their overt acts are apparently inconsistent with good faith, and therefore, they establish bad faith, and an intended deception on the rest of the world. The statute under consideration is based upon this principle. If it did not before exist in the law of Virginia, the statute created it there: and fixes a possession of five years as that which shall constitute or prove the fraudulent intent. It is more probable that it existed as a part of the common law of that state; because, in the absence of legislative enactments to the contrary, possession is the natural evidence of the ownership of chattels, and it is an inference of right reason, that such a possession may deceive, and was intended to deceive. In that case the statute only defined and limited the possession that should be deemed fraudulent. Previously, one for a shorter period might have been held by judges and jurors, sufficient evidence of fraud; but where the statute says that shall be the period, it must be understood to mean that a shorter possession shall not be deemed fraudulent. It is, therefore, now fixed at five years, whatever it may have been before. But whether existing

anterior to the statute, or created by it, one cannot doubt that the rule proceeds entirely upon the hypothesis, that goods can legally, and do usually, pass by verbal contract and delivery. It can have no other foundation; for if they can pass only by writing, or other notorious ceremony, the naked possession cannot evince an intent to defraud, and cannot in fact be deceptive, since the possession is no evidence of the existence of the requisite writing, or other ceremony. An
(346) illustrative example is presented in the rule of the English law and our own, respecting land; of which the possession is not evidence of title, unless it be continued adversely so long as to raise a presumption of a conveyance, for the benefit of the possessor as well as his creditors. Possession of land merely, is therefore, no evidence of fraud in any case. When, therefore, the statute enacts that five years' possession, but nothing short of it, shall be deemed fraudulent, it can mean only such possession as may be had in that state, where there is a presumption of title from the single fact of possession; for the fraud is an inference solely from the impression made upon the world by the possession as evidence of ownership. If the possession had been for five years in Virginia, a creditor might have a right to satisfaction out of the slaves in this state. That might also be true, although a part of the possession were in another state, provided that in the latter, as in Virginia, possession be also evidence of title. We need not entangle ourselves in those inquiries; for the case before us is essentially different from either of those supposed. If the fraud mentioned in this act, is inferred from the possession in Virginia, because it is there evidence of ownership, it cannot be constituted by a possession of five years, of which part occurred in this state, because here the possession of the bailee is no evidence of title in him, and consequently is no evidence of fraud on his creditors. By our law this particular species of chattels, slaves, cannot pass by gift, unless it be in writing, proved and recorded. To sustain the policy of our statute containing that provision, the Courts have been obliged to hold, that possession under a loan is not fraudulent against the bailee's creditors; "for it would be a manifest departure from judicial interpretation to treat as a fraud what the law," as enacted by the legislature "sanctions." *Hill v. Hughes,* 18 N. C., 336. The

case which has actually occurred, is not therefore, within the statute of Virginia. The possession in Virginia did not amount to fraud. That which took place here cannot be connected with it, so as to constitute the fraud; (347) for all idea of fraud is repelled, when it is known that in this state, no argument of title can be drawn from a possession acquired by loan and therefore, that no person could be deceived by it. The owner could not have intended to defraud persons dealing with his son-in-law, by allowing him to bring the slaves into a state in which possession under a loan is no proof of title or fraud; and therefore, he is not within the purview of the act. This will appear the clearer if we advert for a moment to the opposite case. Suppose a loan in this state for an indefinite period, and that the lender allows the slave to be carried into Virginia, and kept there for five years. It seems obvious that the contract here, though valid and fair by our law, would not purge the fraud on creditors in Virginia, arising out of the possession there. It would be a fraud there because there the possession is deceptive; and the owner ought not to be accessory to the deception. But where the possession does not, and cannot, have that effect, the whole argument fails. Such is the case at bar. No fraud had been perpetrated in Virginia, and the slaves came here, the plaintiff's. Since that period he has committed no act of fraud here, by which he could lose them. Judgment affirmed.

PER CURIAM. Judgment affirmed.

(348)

THE STATE v. EZEKIEL W. MORGAN.

1. In a prosecution for forgery, the forged note being seen in the hands of the defendant, in the county in which the forgery is charged to have been committed, is, in the absence of all proof of the place where, and the person by whom the note was actually forged, sufficient evidence to justify a conviction.

2. Forgery being a misdemeanor only, the defendant is not entitled to thirty five peremptory challenges under the act of 1777, (*Rev. c. 115, sec. 85,*) unless the offence is charged to be a second one

3. A defendant in attempting to prove an *alibi*, cannot give in evidence what he stated to a witness, who saw him at a distant place at a particular time.

4. An indictment charging, that the defendant did "falsely forge and wittingly assent to the falsely making," etc., following the words of the statute, is according to the precedents, and sufficient.

The defendant was indicted in the county of Stokes, as follows: "The jurors for the state, on their oath, present that Ezekiel W. Morgan, late of, &c., on, &c., with force and arms in, &c., of his own head and imagination, did wittingly and falsely make, forge and counterfeit, and did wittingly assent to the falsely making, forging and counterfeiting a certain bond and writing obligatory in the words, letters and figures, that is to say, &c.," (setting out a bond for eight hundred dollars, payable to Frederick H. Shewman, the agent of the Bank of Cape Fear at Salem, payable at the office in Salem) "with intent to defraud the said Frederick H. Shewman, agent as aforesaid, against the form of, &c."

The defendant having pleaded not guilty, the trial was removed to Guilford, where it came on before his Honor *Judge Dick,* on the last Circuit. In forming the jury, the defendant claimed the right to thirty-five peremptory challenges; and also to examine every juror on his oath, whether he had not formed and expressed an opinion unfavourable to the prisoner; assigning as a reason the fact, that a second conviction was punished capitally; but his Honor disallowed these claims.

On behalf of the state, Mr. Shewman, the agent of the Bank of Cape Fear at Salem, testified, that in March, 1836, the defendant called at his office, and inquired as to
(349) the mode to be pursued in obtaining a discount at the bank; that one week thereafter the defendant called

again, and presented for discount a promissory note, which was refused for some informality in it; and the witness then gave him a printed note and directed him how to fill it up; that on the next discount day, the defendant called again with the same printed note—the note set forth in the indictment—properly filled up. This note was then rejected, as nothing was known of the parties to it, and no evidence of their solvency accompanied it. The witness asked the defendant where he lived, and was informed, that he lived in Guilford, in the vicinity of Mr. Andrew Lindsay. He was told that the statement of Mr. Lindsay as to the solvency of the parties to the note, would be satisfactory. The next week the defendant again came to the office with the same note, and the certificate of Mr. Lindsay as to the solvency of the parties to it; upon which it was discounted, and the proceeds paid over to the defendant. This was done on 19 or 20 April, 1836. The state then proved that the note and accompanying certificate were both forgeries.

The defendant on his part, then introduced John Lamb, who deposed that he saw the defendant in Guilford county on Monday, 18 April, 1836, at a place about nineteen miles distant from Salem; and that on 20th of the same month, the defendant came to his house nineteen miles from Salem, about 11 o'clock in the morning. The defendant proposed to prove also by this witness, that he, the defendant, on that occasion, told the witness where he had been on the day before, to wit, the 19th, but his Honor refused to receive the evidence. The defendant then introduced one Boyd, who swore, that on Tuesday, 19 April, he fell in company with the defendant, at noon, about thirty miles from Salem, in Guilford county; and proposed to prove further by Boyd, the reason assigned by him for being, on that day, in that part of Guilford county: but this evidence was also rejected.

His Honor charged the jury, that they might, from the evidence before them, presume that the note was forged in Stokes county; that the absence of all testi- (350) mony that the forged note had ever been out of that county, and the fact of its only existence being proved to be in it, was *prima facie* evidence of a forgery there.

The defendant was convicted; and a rule for a new trial

being discharged, his counsel moved in arrest of judgment, and assigned as a reason, that the indictment was inconsistent in charging, that the defendant did both "falsely make," &c., and "assent to the false making," &c. This motion being overruled, and judgment pronounced on the verdict, the defendant appealed.

Winston, for the defendant.
The *Attorney-General,* for the state.

RUFFIN, Chief Justice: It has been contended on behalf of the prisoner, that there was not evidence that he committed the forgery; or, if so, that he did it in the county of Stokes; and, therefore, that the Court erred in stating to the jury that the testimony, if believed, was *prima facie* evidence of those facts, which was sufficient, if unexplained by the prisoner, to authorize them to find him guilty.

It is certainly true, that the prisoner must be connected with the fabrication of the instrument by evidence, direct or circumstantial. It is equally true, that a making within the county is necessary. But that also may be presumed upon reasonable grounds. Few frauds, or offences partaking in their nature of fraud, are perpetrated openly, so as to be capable of express proof. If more than one person was present at the perpetration, it is almost certain that all participated; so that each is protected from testifying. Hence, there is both a necessity, and a propriety in resorting to presumption from circumstances. It is possible, indeed, that a wrong inference may be deduced from them; but the necessity is so pressing, that a bare possibility of mistake must not over-rule it; and while guilt is not presumed from any circumstances, unless, in the whole, they are apparently inconsistent with innocence; the danger of injustice is rather ideal than real. Practically it promotes public justice, while it scarcely ever imputes guilt to
(351) one, who is not in fact the offender. In larceny, for instance, the possession of the stolen goods is evidence, that the possessor was the thief. It is the usual evidence. It is deemed cogent, because no more can be expected; being the best that is admitted by the nature of the case. It is obvious, however, that this changes the *onus* of

offering the direct proof. It imposes it on the accused to show how the goods came to him, and therefore that he did not, but that some other person committed the theft. Why is this? It is because it is peculiarly within the power of the prisoner to give evidence, how his own possession was gained. It is natural that he should offer it, if he came by the goods honestly. To withhold it, must then be imputed to the non-existence of the fact. The force of the presumption, it is thus seen, depends upon the ability of the accused to show, with facility, the real truth, and his refusal to do so. If, in the case supposed, there be other circumstances, from which it may be judged, that, certainly or probably, his possession was not acquired by his own taking, then the whole presumption fails; as if, at the time of the theft, the prisoner was at too great a distance from the place to admit of his personal agency. So this presumption may be greatly weakened by the circumstance, that the accused would be put to a difficulty in explaining his possession, even were it an honest one; as if the theft and his possession were not recent. The presumption is, then, so much impaired, that guilt cannot be inferred from it alone. But in the absence of such circumstances, the possession of stolen property which the accused fails to give any reasonable account of, is the common and satisfactory evidence of his guilt. Whether this conclusion be one of law or of fact, seems to be hardly worth inquiring; for it is one of common sense, which every sound mind will draw, with the slightest acquaintance with mankind. The same principles and reason apply with equal force to every act done in secret, and with which, when it becomes known to the world, the accused is found to be the first and only person connected.

Forgery is not an exception. It is true, the statutes usually provide against the passing or uttering of counterfeited instruments, as well as against the falsely making them. (352) It is proper so to provide, because there may be many instances in which the utterer could not reasonably be deemed to have been the fabricator, and others in which the presumption would be almost conclusive, that he was not. An instrument which is current as money, is an example of the former kind: and of the latter, one is furnished, when the utterer is illiterate and unable to write.

There may be cases, therefore, which will not be reached by our act of 1801, (*Rev. c.* 572) which does not extend to uttering, but only to forging and showing forth in evidence. But that does not prevent use being made of uttering, so far as the act of uttering is evidence of the act of forging. Now, with the exception of such papers as pass from hand to hand in the common transactions of life, the uttering of a forged paper, if unexplained, is in sound sense, evidence of the forgery of the paper by the utterer; and if the paper, as in this case, was in his hands in an incomplete state, and was produced by him in a completed state, and made in his own favour or used for his benefit, the proof is cogent and plenary, that his was the hand that fabricated it, or, at the least, that he was present and wittingly assented, and caused it to be fabricated. The Court was of that opinion in the *State v. Britt,* 14 N. C., 122, and we remain satisfied with it. It is to be remembered, that the fact of forgery is, for the purpose of this inquiry, taken for granted. Then, if the prisoner be not the forger, who is? There is not the least reason to attribute the act to any other person. When he says, that some other may have done it, he is fully answered by saying, that he ought not to have advantage of that possibility, because the proof does connect *him* with the paper, and yet he refuses to offer evidence to render his supposed and possible fact even probable, while he could, if he chose, make it certain by direct proof. The affirmative inference is thus made as strong against him from his withholding the negative evidence he might give, as it could be made by express evidence on the part of the prosecution.

As a consequence from the same train of reasoning, the opinion of the Court is also against the prisoner, as
(353) to the county in which the forgery was committed. The jury found it to be in Stokes; and we think that there was not only evidence fit and sufficient to be left to them to authorize that finding, but sufficient also, if believed, almost to compel such a finding. It seems to us to be a reasonable presumption, generally, that an instrument was made at the place where its existence was first known. If this be not reasonable, why is it not so? It must be, because it is possible, or equally probable, that it was made at some other place. But in the case before us, we have *no* evidence, that

the instrument was made at any *other place*. It was certainly forged by the prisoner somewhere; and the question is, where? If it be unreasonable, as is argued, to conclude that the place was that where it was published, is it not yet more unreasonable, nay, absurd, to suppose that it was forged by him at some place where it was not found, and where it does not appear ever to have been? It seems to be fairer reasoning, that as the uttering a forged instrument of this sort, is *prima facie* evidence that the utterer is the forger, because he will not affix the act to any other person; so the uttering it at a particular place, by the person who forged it, must be evidence that he forged it at that place, because he was equally capable of doing the act at any place, and he will not give to the deed, any other locality. The apparent necessity renders each of those presumptions equally reasonable and fair. The perpetration, and the place of perpetration, are both secret. They are concealed by the accused, and the state can offer no evidence but such as connects the prisoner with the paper, at a particular place. If he will not disconnect himself from the instrument, or disconnect the forgery from that place, the only result at which the mind can arrive, is that he forged it, and that he forged it there. If, therefore, there had been nothing more than the production of the forged paper by the prisoner in Stokes, it was evidence proper to be left to the jury, that the crime was committed in that county, as there was nothing in the paper itself or *dehors*, to raise the doubt that it was done in another county.

But when to that presumption thus unrebutted, are added the other affirmative facts, that the prisoner received from the cashier, the identical paper in a blank form (354) in the county of Stokes; that he produced it in that county in its present form, a week afterwards, and again the subsequent week; that he was a stranger to the cashier, and in answer to his inquiry, told him that he lived in Guilford county; and upon his trial, which took place in Guilford, he gave no evidence of the truth of that representation, nor of a residence at any particular place; the original presumption becomes so strongly corroborated, as to make it almost certain, that the forgery was in fact committed in Stokes county, and that the prisoner could not have proved it to have been done elsewhere.

The cases cited for the prisoner, are quite reconcilable with our opinion. They do not lay it down, that uttering is not evidence of the forging, or that uttering at a particular place by the forger, is not evidence of the forgery at that place. The contrary is to be collected from them; for they proceed on the particular circumstances in each, which tended to prevent or rebut these presumptions. In *Parks and Brown's* case, 2 East, Pl. Cr., 992, Parkes forged the note; but there was no evidence that he ever had the note in his possession in Middlesex; for his accomplice Brown passed it. The very ground of the presumption, therefore, failed as against Parkes. Yet some of the judges even in that case held, that it was a case for the jury, on that and the other circumstances proved, namely, that Parkes was in Middlesex when Brown passed the instrument, and other notes of the same kind were found on his person, when he was arrested in that county. But the majority of the judges thought that there was not sufficient evidence of the forgery there, and recommended a pardon: properly, as we think, because Parkes was not at all connected with the particular note at any time in Middlesex. The presumption was not raised against him. In *Crocker's case,* 2 New Rep., (5 Bos. & Pul.) 87, it was otherwise. There the presumption did arise; but it was rebutted by other circumstances. The prisoner was indicted in Wiltshire, where he had resided for a year, and where the forged note was found in his pocket-book, (355) at his lodgings, upon a search made during his absence on a journey to London. The note purported to be signed by one Tucker, who lived in Somersetshire, and to be dated two years before; at which time, and for one year afterwards, the prisoner also lived in Somersetshire, a neighbour to Tucker. These circumstances created a probability that the note was written in Somersetshire. It was not found on the prisoner, so that it was certain that it was not forged immediately before it was found, but at some time before; and it was just as probable, upon these facts, that it was written while the prisoner lived at his former as at his present residence; and more so, from the date. The opinion of the Court was never publicly given; but the reporters state that it was understood, that a majority of the judges thought "there was not sufficient evidence, that the offence was com-

mitted in the county of Wilts." This is not a satisfactory method of learning a judicial opinion. But if it was correctly understood, it does not seem that the evidence was not deemed proper to be left to the jury; but only that the Court thought, the verdict had been rendered without "sufficient evidence;" and therefore, recommended a pardon, not for error of law, but for a wrong conclusion of fact by the jury. The circumstances rendered it at least doubtful, where the forgery was committed; and therefore, the pardon was properly asked. But that is not a question for this Court; which is confined to errors in law. If it were, this case would not call for a recommendation upon that ground; for the presumptions here are not rebutted by any evidence whatever. In our opinion the case was left properly to the jury upon evidence which fully warranted a verdict against the prisoner. In *Crocker's case,* if the evidence was insufficient to prove the forgery in Wilts, it necessarily showed it to have been done in Somerset; and there was therefore, the means of bringing the offender to justice. But in this case if the prisoner cannot be found guilty upon an indictment in Stokes, he must be acquitted everywhere, although he is an acknowledged offender. It is impossible an admitted crime should go altogether unpunished; as would be the case if the uttering of a forged instrument in a county, (356) were not some evidence of the forgery there, and if unrebutted, it were not sufficient evidence of that fact.

The other opinions of the Court to which the prisoner excepted, seem to us to be also correct.

The act of 1777, (*Rev. c.* 115, sec. 85) gives thirty-five peremptory challenges only on trials for life. Forgery, under the act of 1801, (*Rev. c.* 572) is a misdemeanor, unless it be a second offence, and it is not so charged in this case.

Benton's case, at the last term (see ante, 196) ruled that a prisoner cannot examine a juror to discover a cause of challenge; but he must first make his challenge, and assign the cause, and then he may sustain it by the oath of the juror, or any other person.

So far as Lamb and Boyd could establish an *alibi,* the prisoner had the benefit of their evidence. It does not appear what was the nature of his declarations to them, which he wished to get out; but whatever they were, they could not

for him establish the truth of the facts declared, and were, therefore, properly rejected.

The cumulative charges of forging, and wittingly assenting to the forgery, are according to the precedents; and no other defect is perceived in the indictment, on which the motion in arrest of judgment can be sustained; and upon the whole record, the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: *State v. Lane,* 80 N. C., 409; *State v. Hall,* 108 N. C., 778; *State v. Peterson,* 129 N. C., 558.

MARCUS SMALLWOOD v. JAMES H. WOOD.

A person who is surrendered in discharge of his bail, is entitled to the benefit of the act of 1822, (*Taylor's Rev c. 1131,*) for the relief of insolvent debtors.

This was an action of debt against the defendant, the sheriff of Northampton, for an escape, submitted to Bailey, Judge, on the last Circuit, upon the following facts, (357) in the shape of a case agreed.

The plaintiff had recovered a judgment against one Carter Jones, for four hundred dollars, upon which a *ca. sa.* issued, and was returned, "not to be found." At the return day, Jones was surrendered in open Court by his bail, in discharge of themselves, and was by the plaintiff prayed into custody, and was committed to the defendant: who, having Jones thus in his custody, afterwards took from him a bond for his appearance to take the benefit of the act of 1822 (*Taylor's Rev. c.* 1131) for the relief of insolvent debtors, and permitted him to go at large. The bond was in all respects correctly drawn.

For the plaintiff it was insisted, that as Jones was not arrested under a *ca. sa.;* but was committed to the custody of the defendant, upon a surrender by his bail, he was not entitled to the benefit of the act; but his Honor being of a different opinion, judgment was entered for the defendant; and the plaintiff appealed.

SMALLWOOD *v.* WOOD.

B. F. Moore, and *J. H. Bryan,* for the plaintiff.
Badger, for the defendant.

DANIEL, Judge: The first section of the act of 1822, declares, that where any debtor shall be taken upon any *ca. sa.*, for any debt, &c., and shall be desirous to take the benefit of the oath for the relief of insolvent debtors, it shall be lawful for such debtors to tender to the sheriff of the county, deputy, &c., by whom he may be taken, a bond payable to the party at whose instance the arrest was made, to appear at the next court and abide such proceedings as may be had by the Court in relation to his taking the benefit of the act. The second section makes it the duty of the sheriff to release the debtor from confinement or custody, on the tender of such bond as is prescribed in the act. The plaintiff contends, that Jones was not entitled to the benefit of this act; but that he should have been put in jail, and there remained twenty days; and taken the benefit of the insolvent act of 1773, (*Rev. c.* 100). That the act of 1822 only embraced those debtors who were taken out of Court by the officers, by virtue of a judicial writ of *ca. sa.* We do not (358) agree in opinion with the plaintiff. Such a construction of the act of 1822, would, as it seems to us, be too rigid. It would exclude from the benefit of the act, all that class of debtors who should be surrendered to the Court by their bail, or who should surrender themselves in discharge of their bail; although their claims to the benefit of the act seem to rest on principle equal to any other class of debtors. There is neither reason nor policy for such a discrimination; and the legislature did not, we think, intend to make a distinction between debtors standing in these different positions. It seems to us, that the order made by the Court, on the surrender of the bail, that the body of Jones should be taken and held in the custody of the sheriff, until the judgment was satisfied, brings his case within the meaning of the act. And when the Sheriff received Jones by virtue of that order, he was "taken," within the spirit and meaning of the act; and he had a right to tender his bond to the sheriff, who was obliged to receive the same, and discharge him. Such a course of proceeding seems to be plainly within the direction

of the act. We are therefore of the opinion, that the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: State v. Ellison, 31 N. C., 274.

RUSSEL L. JONES v. ROBERT PENLAND, et al.

Accepting of a declaration, and entering a plea, is a waiver of any defect of process; and where process was executed upon five out of six defendants and all joined in a plea, the fact of its not having been executed upon all, does not work a discontinuance of the cause.

The defendants together with one Rogers were impleaded in the Superior Court of Buncombe, by the plaintiff, in an action of trespass *vi et armis.* The writ was executed on all but Rogers. On the return of the writ, there was the following entry.

"And thereupon the defendants, by G. W. Candler their attorney, came and defend the force and injury, when, &c., and say that they are not guilty of the supposed (359) trespass above laid to their charge, or any part thereof, in manner and form as the said Russel L. Jones hath above complained of them. And of this, they, &c."

At the last, which was the trial term, the plaintiff entered a *nolle prosequi* as to Rogers; but his Honor, *Judge Pearson,* thinking that the fact of Rogers not having been taken, had worked a discontinuance of the cause, judgment was entered accordingly; and the plaintiff appealed.

No counsel appeared for either party in this Court.

DANIEL, Judge: By an appearance, and taking a declaration and entering a plea, you waive all objections to the process, 2 Stra., 1072. The appearance by attorney is evidence of notice. *Kennedy v. Fairman,* 2 N. C., 405. The defendant Rogers, may not probably have signed the power of attorney, to Mr. Candler, or authorized him to appear; the power of attorney is not inserted in the case sent here. But as the

record now stands, the appearance and plea stands joint for all the defendants, including Rogers; and we must take it, that the attorney had the power to appear for him. If Rogers gave no power to the attorney, and the defendants should hereafter move the Court to amend the record, by restricting the appearance and plea to those defendants who were actually arrested under the writ, the motion will be granted, we presume, on condition that the plaintiff have leave to enter a *nolle prosequi*, as to Rogers, as of the term the defendants put in their plea. In actions *ex delicto*, the plaintiff may enter a *nolle prosequi* as to some of the defendants, and proceed against the others, at any time before final judgment. 2 Archb. Prac. B. R., 249, (*and the authorities there cited*). Looking at the record as exhibited to us, we think the case was not discontinued in consequence of the process not having been run out as to Rogers. The judgment must be reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

Cited: State v. Jones, 88 N. C., 685; *Caldwell v. Wilson,* 121 N. C., 453.

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JONES DAVIS v. JOHN G. GULLY, et al.

A bond with a condition to be void upon the payment of such damages as might be recovered of the principal obligor, for wrongfully bringing a suit in equity against the obligee, is a guaranty that the principal shall be able to satisfy any judgment obtained against him, in an action on the case, for wrongfully filing the bill; and no action can be brought on such bond until the obligee has obtained such a judgment, and failed to procure satisfaction.

This was an action of debt, upon a bond given by the defendants, upon suing a writ to sequester sundry negroes in the hands of the present plaintiff. Plea, *non infregit conventionem.*

On the trial, before *Bailey, J.*, at Johnston, on the last Circuit, the case appeared to be as follows: A bill in equity was instituted by John G. Gully and others, against the

present plaintiff, Jones Davis, in the Court of Equity for the county of Johnston, and a *fiat* made thereupon for issuing writs of *ne exeat* and sequestration, upon the complainant's entering into bond with sufficient security in the sum of five thousand dollars, with condition to be void, on the payment of such damages as might be recovered by the defendant, for wrongfully suing forth the said writs. In consequence of this fiat, the present defendants executed their obligation to the plaintiff, in the penal sum of five thousand dollars, upon condition to be void "upon payment of all such costs and damages that the said Jones Davis" (the present plaintiff) "shall recover against John G. Gully and the other complainants, for wrongfully bringing a suit against him in the Court of Equity for Johnston County." The writ of sequestration issued. Upon the coming in of Davis's answer, the complainants had leave to amend their bill, and it was ordered that the writ of sequestration be dissolved, on defendant's giving special bail, in the sum of two thousand dollars. Thereupon, at the same term, an amended bill was filed, making some alteration in the parties complainants; and by consent of the parties on both sides, an interlocutory order was made, whereby the matter in controversy was
(361) referred to the award of two professional gentlemen, with an agreement, that if they should decide in favour of the complainants, they should award to them in lieu of the negroes claimed by their bill, the money which was due from one John P. Yeargan, on account of the purchase of the said negroes from the then defendant, Jones Davis, and the sequestration was set aside. At the succeeding term, no award having been returned, the order of reference was discharged; and it was ordered by the Court, that the defendant should file with the clerk and master, the bond of Yeargan; that the same should be collected by the said clerk and master, as soon as it should become due, and the proceeds kept subject to the disposition of the Court. When the suit in equity was brought to a final hearing, the bill of the complainants was dismissed; and it was ordered, that the defendant have leave to put in suit the bond given by the complainants for the recovery of such damages as the defendant may have sustained by the wrongful suing out of the writ of *ne exeat*, or order of sequestration prayed and obtained by the

complainants. Thereupon Jones Davis instituted this action, and on the trial offered, as evidence of a breach of the condition of the bond, testimony tending to show that he had sustained damage, by reason that Yeargan's bond had not been collected by the clerk and master as it might have been, had its collection been pressed with diligence; and that the damage so sustained had not been paid to him. It being admitted by the plaintiff's counsel, that no suit had been brought against Gully, or any of the other complainants in the suit in equity for wrongfully instituting said suit, and, of course, no recovery of damages effected by the plaintiff, by reason thereof, the Court was of opinion, that the testimony offered was insufficient to establish a breach of the condition of the obligation; and thereupon the plaintiff submitted to a nonsuit, and appealed.

Badger and *Devereux,* for the plaintiff.
W. H. Haywood, for the defendants.

GASTON, Judge, after stating the case as above, proceeded as follows: Several points were made here in support of the opinion below: but we deem it necessary to notice one only, for that appears to us to be decisive. (362)

The condition is not for the payment of such damages as shall be *sustained* by the plaintiff for wrongfully instituting the suit in equity, but for the payment of such as shall be *recovered* by the plaintiff for wrongfully instituting the suit. The obvious and unambiguous meaning of this condition is, that the obligors guaranty the amount of any judgment which the plaintiff may obtain in an action to be brought against the complainants for the injurious institution of their suit. There can be no question, but that conditions shall be so expounded as to serve the intent of the parties; and that when that intent can be satisfactorily collected from the instrument, it shall not be defeated, by an adherence to the mere letter. But what is there upon this instrument, to warrant the inference of any other intent than that which it so distinctly expresses? It is argued, that the intent *expressed* is absurd. Were it so, we should have great difficulty in implying an intention contrary to, or different from that expressed; but it does not appear to be absurd. The bill

filed prayed for a writ very similar in its operation to an attachment at law; and it was reasonable to require, upon issuing such a writ, an indemnity from injury, analogous to that which the law provides on issuing attachments. In these cases it is enacted, act of 1777, (*Rev. c.* 115, sec. 26) that every justice, before issuing the attachment, shall take bond and security conditioned for satisfying "all damages which shall be recovered against the plaintiff *in any suit or suits which may be brought against him* for wrongfully suing out such attachment." It is impossible to doubt the meaning of the terms here employed; and it is manifest, that a condition thus expressed is not broken until after a judgment obtained in an action for wrongfully suing out the attachment, and a refusal or neglect of the obligors to pay the damages recovered in such judgment. The term "recovered," in the condition of the bond under consideration, means the same with "recovered" in the condition of an attachment bond prescribed by the statute, and its meaning in the latter, is fixed, beyond controversy, by the words immediately following. We hold, also, that the words "for wrongfully bringing suit in the Court of Equity," must be interpreted as the analogous words in the condition of an attachment bond have been interpreted—the bringing of a suit maliciously, and without probable cause. *Williams v. Hunter,* 10 N. C., 345. It would be premature in us to decide what evidence would be demanded of the plaintiff in an action on the case, to sustain the allegation that the bill in equity had been instituted for the purpose of oppression and wrong, but we perceive no more difficulty in establishing the allegation, if true, than there was in the case of *Hackney v. Mathews,* which was brought for maliciously impleading the plaintiff in the Ecclesiastical Court: 1 Vent., 86; 2 Inst., 562; or in the case of *Brown v. Chapman,* for maliciously suing out a commission of bankruptcy. 1 Black., 427. An action on the case lies against any person who maliciously and without probable cause, prosecutes another *before any tribunal,* and thereby subjects him to an injury, either in his person, property or reputation. The purpose of the bond in this case, was to secure the plaintiff against the inefficiency of this com-

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mon law remedy, if the complainants in the suit in equity should be unable to respond the damages.

PER CURIAM. Judgment affirmed.

Cited: Falls v. McAfee, 23 N. C., 140; *Falls v. McAfee,* 24 N. C., 238; *Barnett v. Nicholson,* 79 N. C., 551; *Ely v. Davis,* 111 N. C., 27.

PHILIP BRITTAIN, et al. President and Directors of the Buncombe Turnpike Company v. SAMUEL NEWLAND.

Debts due a corporation must be sued for in the corporate name; and cannot be recovered in an action brought in the names of A. B., president, and C. D. and E. F., directors of such company.

This was an action of assumpsit, in which the plaintiffs, "Philip Brittain, president, and Samuel Chunn and James M. Alexander, directors of the Buncombe Turnpike Company," declared against the defendants, for tolls due them from the defendant, for passing over their road. Plea, *non assumpsit.*

On the trial at Buncombe, on the last Circuit, his Honor *Judge Pearson,* rejected all the evidence of the (364) plaintiffs, thinking that the tolls could be recovered only in an action brought in the name of the corporation, viz. "The Buncombe Turnpike Company;" and the plaintiffs were non-suited, and appealed.

No counsel appeared for the plaintiffs in this Court.

Badger, for the defendant.

DANIEL, Judge, after stating the case as above, proceeded: The act of assembly passed in 1824, incorporated the subscribers to the stock into a company, by and under the name and style of "The Buncombe Turnpike Company;" and it declared, that as such, the corporation might sue and be sued, and have perpetual succession, and a common seal, and all other corporate rights necessary for the objects of the company. The seventh section of the said act, authorizes the president and directors to demand and receive, at some con-

venient toll-gates, the tolls. We think this section only constituted the president and directors agents for the corporation, for the objects there mentioned. It did not authorize them to sue for the tolls in their own names, although they should make the addition to their names in the writ, that they were the President and Directors of the Buncombe Turnpike Company. The suit should have been brought in the name of the corporation, and to answer "The Buncombe Turnpike Company." The defendant, if he owed at all, in the supposed case, owed no one else. We think the plaintiffs were properly non-suited; and the judgment must be affirmed. The plaintiffs might, on motion and payment of the cost, have had the writ and declaration amended, by striking out the names of the plaintiffs, and their additions. *M'Clure v. Burton,* 4 N. C., 84. The writ would then have stood thus—"then and there to answer the Buncombe Turnpike Company, of a plea of trespass on the case, &c." As no motion to amend was made, the judge was obliged to reject the evidence offered, as it was not pertinent to the plaintiff's case.

PER CURIAM. Judgment affirmed.

Cited: Deaf and Dumb Institute v. Norwood, 45 N. C., 73; *Young v. Barden,* 90 N. C., 425.

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(365)

THE STATE v. RACHEL PENDERGRASS.

The law confides to schoolmasters and teachers a discretionary power in the infliction of punishment upon their pupils, and will not hold them responsible criminally, unless the punishment be such as to occasion permanent injury to the child; or be inflicted merely to gratify their own evil passions.

This was an indictment for an assault and battery, tried before *Dick, J.,* at Caswell, on the last Circuit.

On the trial the facts were, that the defendant kept a school for small children: that upon one occasion, after mild treatment towards a little girl, of six or seven years of age, had failed, the defendant whipped her with a switch, so as to cause marks upon her body, which disappeared in a few days. Two marks were also proved to have existed, one on the arm,

and another on the neck, which were apparently made with a larger instrument, but which also disappeared in a few days.

His Honor instructed the jury, that the right of the defendant to chastise the child, was coextensive with that of a parent; and that they should be cautious in coming to a conclusion, that excessive chastisement had been used. But as the child was of tender years, if they believed that she had been whipped by the defendant, with either a switch or other instrument, so as to produce the marks described to them, the defendant was guilty. A verdict was found for the state; and the defendant appealed.

No counsel appeared for the defendant in this Court.
The *Attorney-General,* for the state.

GASTON, Judge: It is not easy to state with precision, the power which the law grants to schoolmasters and teachers, with respect to the correction of their pupils. It is analogous to that which belongs to parents, and the authority of the teacher is regarded as a delegation of parental authority. One of the most sacred duties of parents, is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad (366) habits; and to enable him to exercise this salutary sway, he is armed with the power to administer moderate correction, when he shall believe it to be just and necessary. The teacher is the substitute of the parent; is charged in part with the performance of his duties, and in the exercise of these delegated duties, is invested with his power.

The law has not undertaken to prescribe stated punishments for particular offences, but has contented itself with the general grant of the power of moderate correction, and has confided the graduation of punishments, within the limits of this grant, to the discretion of the teacher. The line which separates moderate correction from immoderate punishment, can only be ascertained by reference to general principles. The welfare of the child is the main purpose for which pain is permitted to be inflicted. Any punishment,

therefore, which may seriously endanger life, limbs or health, or shall disfigure the child, or cause any other permanent injury, may be pronounced in itself immoderate, as not only being unnecessary for, but inconsistent with, the purpose for which correction is authorized. But any correction, however severe, which produces temporary pain only, and no permanent ill, cannot be so pronounced, since it may have been necessary for the reformation of the child, and does not injuriously affect its future welfare. We hold, therefore, that it may be laid down as a general rule, that teachers exceed the limits of their authority when they cause lasting mischief; but act within the limits of it, when they inflict temporary pain.

When the correction administered, is not in itself immoderate, and therefore beyond the authority of the teacher, its legality or illegality must depend entirely, we think, on the *quo animo* with which it was administered. Within the sphere of his authority, the master is the judge when correction is required, and of the degree of correction necessary; and like all others intrusted with a discretion, he cannot be made penally responsible for error of judgment, but only for wickedness of purpose. The best and the wisest of (367) mortals are weak and erring creatures, and in the exercise of functions in which their judgment is to be the guide, cannot be rightfully required to engage for more than honesty of purpose, and diligence of exertion. His judgment must be *presumed* correct, because he is *the judge,* and also because of the difficulty of proving the offence, or accumulation of offences, that called for correction; of showing the peculiar temperament, disposition, and habits, of the individual corrected; and of exhibiting the various milder means, that may have been ineffectually used, before correction was resorted to.

But the master may be punishable when he does not transcend the powers granted, if he grossly abuse them. If he use his authority as a cover for malice, and under pretence of administering correction, gratify his own bad passions, the mask of the judge shall be taken off, and he will stand amenable to justice, as an individual not invested with judicial power.

We believe that these are the rules applicable to the decis-

ion of the case before us. If they be, there was error in the instruction given to the jury, that if the child was whipped by the defendant so as to occasion the marks described by the prosecutor, the defendant had exceeded her authority, and was guilty as charged. The marks were all temporary, and in a short time all disappeared. No permanent injury was done to the child. The only appearances that could warrant the belief or suspicion that the correction *threatened* permanent injury, were the bruises on the neck and the arms; and these, to say the least, were too equivocal to justify the Court in assuming, that they did threaten such mischief. We think that the instruction on this point should have been, that unless the jury could clearly infer from the evidence, that the correction inflicted had produced, or was in its nature calculated to produce, lasting injury to the child, it did not exceed the limits of the power which had been granted to the defendant. We think also, that the jury should have been further instructed, that however severe the pain inflicted, and however in their judgment it might seem disproportionate to the alleged negligence or offence of so young and tender a child, yet if it did not produce nor threaten lasting (368) mischief, it was their duty to acquit the defendant; unless the facts testified induced a conviction in their minds, that the defendant did not act honestly in the performance of duty, according to her sense of right, but under the pretext of duty, was gratifying malice.

We think that rules less liberal towards teachers, cannot be laid down without breaking in upon the authority necessary for preserving discipline, and commanding respect; and that although these rules leave it in their power to commit acts of indiscreet severity, with legal impunity, these indiscretions will probably find their check and correction, in parental affection, and in public opinion; and if they should not, that they must be tolerated as a part of those imperfections and inconveniences, which no human laws can wholly remove or redress.

PER CURIAM. Judgment reversed.

Cited: State v. Stalcup, 24 N. C., 52; *State v. Black,* 60 N. C., 264; *State v. Rhodes,* 61 N. C., 457; *State v. Alford,* 68 N. C., 323; *State v. McNinch,* 90 N. C., 700;

State v. Jones, 95 N. C., 590; *State v. Bland,* 97 N. C., 443; *State v. Dowell,* 106 N. C., 723; *State v. Stafford,* 113 N. C. 636; *State v. Long,* 117 N. C., 798; *Drum v. Miller,* 135 N. C., 217.

THE STATE v. WILLIAM J. CARSON.

A defect in the examination of a single woman as to the putative father of her bastard child, is waived so as to prevent the proceedings from being dismissed, by the person charged appearing and making up an issue whether he be the father or not.

The defendant was arrested upon a warrant issued by two justices of the peace, under the act of 1741, (*Rev. c.* 30, sec. 10) upon the examination of Esther Parker, a single woman, declaring him to be the father of her bastard child. This examination was defective, in that it did not state the child to have been born within three years before it was taken. The defendant entered into recognizance for his appearance at the next county Court of Haywood, where he appeared, and moved to quash the proceedings for the above-mentioned informality in the examination. This motion was overruled; and the defendant then prayed, that an issue might be made up under the act of 1814, (*Rev. c.* 871) to try the fact whether he was or was not the father of the child. (369) This was done accordingly; and under an act of the legislature giving the exclusive jurisdiction of jury cases to the Superior Court of Haywood, the record was certified to that Court to have the issue tried. It came on before his Honor *Judge Pearson,* on the last Circuit. Before the jury was impannelled, the defendant moved again to quash the proceedings for the irregularity above-mentioned, but the motion was refused. The trial then proceeded; and the mother of the child was examined as a witness, and proved that the child was born about a month before the time when her examination was taken. The jury returned a verdict against the defendant; and he appealed.

No counsel appeared for the defendant in this Court.
The *Attorney-General,* for the state.

STATE *v.* CARSON.

DANIEL, Judge: The act of Assembly passed in the year 1814, declares that "all examinations upon oath to accuse or charge any man of being the father of a bastard child, shall be had and taken within three years next after the birth of said child and not after." In this case, the examination of the mother does not disclose the age of the child. There is no formal judgment of the magistrates entered on the proceedings, declaring that the defendant is the father of the bastard, but he is bound over to Court by two justices, as is set forth in the case. In the County Court, the defendant moved the Court to quash the proceedings for informality. The Court over-ruled the motion. The defendant did not appeal from this decision, and carry the case to the Superior Court in the nature of a writ of error, where the question of law might have been decided; but he prayed that an issue might be made up under the act of 1814, whether or not he was in fact the father of the bastard. This motion was granted; and an issue was accordingly made up. By an act of Assembly the County Court of Haywood was deprived of the power of trying issues by a jury; and the issue was sent into the Superior Court of that county, agreeable to the provisions of the said act, for trial. When the issue came on for trial, the defendant again moved the Judge to quash the proceedings; which motion the Judge over-ruled.
The issue was then tried; and the mother was exam- (370)
ined for the state, and deposed among other things,
that the child was not a month old when her examination was taken before the justices. The jury returned their verdict, that the defendant was the father of the child. The Court gave judgment on the verdict; and ordered a writ of *procedendo* to issue to the County Court to take the defendant's bond, and make the usual orders for annual payments, &c. From this judgment, the defendant has appealed to this Court.

The defendant, by omitting to appeal from the decision of the County Court, and taking the issue which he did, which was obliged to be sent into the Superior Court to be tried by a jury, waived, as it seems to us, any further objection on the score of the examination of the mother of the bastard, not containing the age of the child. That question could not fairly arise before the Superior Court as the case

then stood, unless the state had offered her examination taken before the justices as *prima facie* evidence on the trial of the issue under the act of 1814. The defendant was before the Court; an issue had been made up at his instance and for his benefit; the mother of the child was examined as a witnesss, *viva voce* on the trial, and proved facts sufficient to authorize the jury to give a verdict against him, and to authorize the Court to pronounce such a judgment as the law prescribed. There is nothing in the case to warrant us either to arrest the judgment or grant a new trial. Before we quit the case, perhaps it may not be improper to remark, that there is some difference of construction by the Courts in cases of *orders* of justices in bastardy, and *convictions* of justices under penal statutes and for petty offences. *Orders* of justices in bastardy cases, are police regulations, having for their object, solely an indemnity of the county from money liabilities. They do not partake of the nature of criminal proceedings. Therefore, every intendment will be made to support an order of justices in bastardy. 3 Term, 496; 3 East., 58. Whereas on *convictions* before justices, every thing requisite to support a conviction, should (371) appear on the conviction itself. 6 Term., 538; 4 Com. Dig., 944, Day's edition. *Convictions* before justices are generally for petit offences which partake of a criminal nature. Generally, the offences are created, and the jurisdiction to the justices is given by acts of the legislature. The Court thus created, being an inferior one and of a limited jurisdiction, proceeding not according to the course of the common law; it has been invariably the practice, in favour of liberty and law, for the Superior Courts of general superintending jurisdiction, to hold these inferior tribunals to strict rules, when they attempt to exercise a jurisdiction in any matter savouring of a criminal nature.

The opportunity afforded by our law to the defendant to take an issue, furnishes additional reasons, for making all reasonable intendments in support of the order. It is to be recollected, that the defendant's objection is, that the order was made upon insufficient proof. If he will not rest his defence exclusively upon that, but proceeds to an issue and leaves the former evidence and such other as may be

offered on each side to the jury, the defective proof is completely supplied by the verdict against him. In every point of view, therefore, the judgment ought to be affirmed.

PER CURIAM. Judgment affirmed.

Cited: *State v. Robeson,* 24 N. C., 49; *State v. Ledbetter,* 26 N. C., 244; *State v. Sluder,* 30 N. C., 489; *State v. Brown,* 46 N. C., 130; *Adams v. Pate,* 47 N. C., 15; *Ward v. Bell,* 52 N. C., 80; *State v. Higgins,* 72 N. C., 228; *State v. Ingram,* 85 N. C., 516; *State v. Peebles,* 108 N. C., 769; *State v. Edwards,* 110 N. C., 512; *State v. Burton,* 113 N. C., 660; *State v. Ostwalt,* 118 N. C., 1214; *State v. Ballard,* 122 N. C., 1030; *State v. Liles,* 134 N. C., 739.

THEOPHILUS FALLS, Adm'r of ABSALOM SIMONTON, v. ELI SHERRILL.

A promise to pay a debt barred by the statute of limitations, revives the old contract, or is evidence of similar continued promises from the time the contract was made. Hence it follows, that the first promise should be declared on. And if the new promise be made after the writ is sued out, the plaintiff may recover.

This was an action of assumpsit, commenced by the plaintiff's intestate, for money paid, laid out and expended by the intestate, for the defendant.

The only question between the parties arose upon the plea of the statute of limitations. On that, a verdict was taken for the plaintiff, on the last Fall Circuit, (372) before *Dick, J.,* at Iredell, subject to the opinion of the Court, upon the following facts. The action was commenced 7 Dec., 1832, in the lifetime of Simonton: a few days thereafter the plaintiff, as the agent of Simonton, applied to the defendant for payment of, or security for, the debt. The latter admitted his indebtedness, and offered to give his bond with surety, for the amount due; which was agreed to by the plaintiff; but the defendant subsequently refused to complete the arrangement.

His Honor, thinking that the action ought to have been

brought on the last promise, set the verdict aside, and directed a nonsuit to be entered; and the plaintiff appealed.

D. F. Caldwell, for the plaintiff.
J. W. Norwood, for the defendant.

RUFFIN, Chief Justice: There is no dispute of fact in this case. We collect, from the record, that it was admitted, the defendant made the declarations deposed to by the witness. The question, whether the case is taken out of the statute of limitations, is, under such circumstances, a question of law; and if held affirmatively, there must be judgment for the plaintiff, on the verdict, without sending the parties back to have that testimony passed on by a jury. *Clarke v. Dutcher,* 9 Cowen, 674.

If this acknowledgment had been before suit, and the declaration framed on it, there could be no doubt of its sufficiency. It is a clear and precise acknowledgment of the debt, its amount and present justice, accompanied by a proposal to secure the payment. The cause turns, therefore, entirely on the question of pleading. It is said, that, as no acknowledgment ought or can take a case out of the statute, but such as will amount to a promise to pay the debt, the declaration must, in every case, be on the acknowledgment, as a special promise; and that cannot be done in the case at bar, because the promise in proof was subsequent to the commencement of the suit. The state of facts
(373) certainly raises the point made, and renders a decision of it unavoidable. What shall take a case out of the statute, is a matter of much importance to the rights of suitors; and the Court agrees, that it should be only such an acknowledgment, as would be evidence to sustain an action brought on it as a special promise. It is not of so much consequence, whether such an acknowledgment is to have its operation by giving an action on it, or by reviving the remedy on the original undertaking, which was before gone or suspended. It is not so much a point involving principle, as the mode of proceeding; and its decision may therefore, with more propriety, be placed on the ground of precedent and authority.

Many sayings have dropped incidentaly from judges in

modern times on this question. But we believe there has been no adjudication before the present, that, in the case of verbal promises between the same individual persons, the action would not lie on the original contract. It has not been decided in this state, that it would not. In *Bank v. Sneed,* 10 N. C., 500, the question was argued, but not decided. *Judge Henderson* remarked, that although he rather thought the principle was the other way, the weight of authorities was much in favour of the old promise; and that the new one repels the bar of the statute. We think he was certainly well warranted in the latter part of the proposition. It is true, that it was settled, upon a technical principle of pleading, that the declaration must be on the new promise, when it is made by or to an executor; and from that the Court would neither feel inclined nor at liberty to depart, because it is settled. But the cases are very numerous of every other sort, in which it was held, that an acknowledgment authorized a recovery upon the first cause of action, either because it revived the remedy, to which alone the statute applies, or because it was evidence of a continuing promise throughout the period from the time of making the first to that of the last. Formerly, and especially in the time of *Lord Mansfield,* it seems to have been put on the first ground. More recently, the last view has been taken of it. The late statute of 9 Geo. IV., in England, for instance, treats it in that way. It provides that "no (374) acknowledgment or promise by words only shall be deemed sufficient *evidence of a new or continuing contract,* whereby to take any case out of the operation of the said enactment, or to deprive any party of the benefit thereof." It is not very refined, and certainly not irrational, when an original promise has been proved, to infer from a promise now made, that an intermediate one, or many such, had likewise been made, if they be between the same parties, and to do the same thing. A difficulty may be suggested, when the acknowledgment is conditional. It is true, that the promises are not then identical in terms. But after the performance of the condition, such a promise furnishes evidence of all the facts from which a previous absolute promise within the time of limitation may be inferred. It is a positive admission that the debt is due; that the defendant had been willing to

pay it; and until he interposed a condition, was willing and liable absolutely to pay it. If this view of the subject be the correct one, it follows, that it is immaterial at what period before the trial the acknowledgment was made; since as evidence merely, it establishes the existence of the debt, and the defendant's liability at the commencement of the suit. Accordingly, declarations subsequent to the suit have often been received as evidence to take a case out of the statute, as they would be of the sale and delivery of the goods, whose price the action was brought to recover. *Bryan v. Horseman*, 4 East., 590; *Lloyd v. Mound*, 2 Term, 760; *Yea v. Fouraker*, 2 Burr., 1099. So also it has been done in many cases in this state, within the experience of every professional gentleman. It is said by the Court, in *Danforth v. Culver*, 11 John., 148, that in all the cases upon the subject, it is considered that the acknowledgment of a debt barred by the statute of limitations, is evidence to the jury of a new promise under the replication of *assumpsit infra sex annos*. Regarded as such evidence, it is not inconsistent with principle, or with the pleading, to admit it under a general count; for the promises, being verbal, are identical, and the time laid in the declaration is immaterial, and not traversable. But it may be said, that the principle will not reach the cases (375) which have been decided upon the promises of one partner, after a dissolution; or upon declarations on a note, or bill of exchange. It must be owned, that there is apparently in this respect a want of the harmony that usually belong to the law. It is certain, however, that cases of the kind spoken of, exist; and that their doctrine is perfectly established, both in England and in this country. That of *M'Intyre v. Oliver*, 9 N.C., 209, follows *Whitcomb v. Whiting*, Doug., 652; and *Chief Justice Taylor* gives as the reason, "that the right to the debt still subsists, though the remedy is suspended, and the acknowledgment of one partner is sufficient to revive the remedy after the dissolution." *Yea v. Fouraker* was on a promissory note. In *Leaper v. Tatton*, 16 East, 420, the action was to recover the amount of a bill of exchange accepted by the defendant, and endorsed to the plaintiff. The declaration contained a special count on the bill, and the common money counts; and to the plea of the statute the plaintiff replied, that the said several causes of

action did accrue, within, &c. The objection was taken at the bar, as far as we can trace it, for the first time, in the English courts, that the plaintiff could not recover on the acceptance according to its tenor; for the promise by the acceptance was gone, and the declaration should be on the special one, that had been substituted for the bill. But the Court held otherwise. *Lord Ellenborough* remarked, "that as to the form of declaring insisted upon, it is enough to say, *that it has never been in use;* but that it is the common practice to declare on the original contract; and if the statute be pleaded, the only question is, whether the defence given by it has been waived. If the objection were good, it would be necessary to recast all the modes of declaring, by way of obviating the possibility of the defendant's taking advantage of the statute of limitations." It is true, he added, that the point was unnecessary, because there was also a count for an account stated, under which the bill and acknowledgment was sufficient evidence. But the expressions quoted contain a strong declaration of the mode of pleading being perfectly established; so much so, in the opinion of (376) Westminster Hall, that no other had at any time been used. The same is assuredly true in our own courts. We know not any higher evidence of the law, than the forms of pleading, settled and adopted by universal usage, through a long course of time. If there were no other authority in favour of declaring on the old promise, this of itself, would constitute the weight of authority mentioned by *Judge Henderson.* The Court has no just power to change it, or the principle on which it is founded. It would be legislating. It is probable that the objection would never have been thought of, but for the effect for some time allowed to extremely loose and vague words in taking a case out of the statute. There is reason to be gratified that it was made, whether that was its purpose or not, since it has brought the courts to consider deliberately the principles of construction for the statute, and to lay down such rules as to the nature of the acknowledgement which will take a case out of it, as will preserve the statute in its integrity, as a protection to those who do not plainly admit a continuing liability for a stale demand. But when admitted, it is a liability for the old debt, upon the original undertaking, or upon a new one of the same tenor.

It is proper to observe, that the action was brought by the intestate Simonton, and upon his death, revived, under the statute, by the present plaintiff, as his administrator. The acknowledgement of the defendant was in the lifetime of the plaintiff's intestate; and is therefore evidence under the pleadings; which contain the language of the original parties. The issues are made between them, and are to be tried as they would be between them.

The opinion of the Court, therefore, is, that the judgment in the Superior Court is erroneous, and must be reversed; and that judgmnet be here rendered for the plaintiff, according to the verdict.

PER CURIAM. Judgment reversed.

Cited: Thompson v. Gilreath, 48 N. C., 495; *McCurry v. McKesson,* 49 N. C., 512; *Fleming v. Staton,* 74 N. C., 204; *Kull v. Farmer,* 78 N. C., 340; *Fleming v. Fleming,* 85 N. C., 129; *McDonald v. Dickson,* 87 N. C., 406; *Pope v. Andrews,* 90 N. C., 404; *Wells v. Hill,* 118 N. C., 908; *Menzel v. Hinton,* 132 N. C., 662.

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(377)

NANCY WILSON v. THOMAS WILSON.

The courts of this state have not power, in petitions for a divorce and alimony under our law, to allow alimony *pendente lite.*

This was a petition for a divorce from bed and board, and for alimony. The petition stated that the marriage took place in the year 1832: that the parties lived together for nine months, during which time the defendant treated the petitioner with great cruelty, and offered such indignities to her person, as to render life burthensome: that at the expiration of nine months from the marriage, the defendant abandoned the petitioner, and removed to an adjoining county, leaving her without a proper support: and concluded with an averment of the general propriety of the petitioner's conduct; of a statement of the probable value of the defendant's

estate; and charged that he was making such a disposition of it, as to defeat the petitioner's claim.

Upon the last Circuit at Perquimans, the petitioner moved, upon sundry affidavits, touching the defendant's intention to secrete his property, for alimony *pendente lite;* but his Honor *Judge Toomer,* refused the application; and upon the prayer of the petitioner, allowed an appeal from his order.

Kinney, for the petitioner.

No counsel appeared for the defendant in this Court.

GASTON, Judge: It is the established law of the Ecclesiastical Courts, in all suits of divorce, or suits for the restitution of conjugal rights, as soon as the Court is judicially informed that the fact of marriage has taken place, that it is competent for the wife to apply for alimony, pending the suit. But it by no means follows, that when our legislature authorized judicial proceedings to be instituted for obtaining divorces, they designed that the tribunals invested with this authority, should pursue this usage of the Ecclesiastical Courts; and without satisfactory evidence of such legislative intention, we cannot infer it. We do not discover in the original act with respect to divorces, act of 1814, (*Rev. c.* (378) 869) or in any of the various supplementary acts thereto, any adoption, by reference, of the usages and forms of the Ecclesiastical Courts. The legislature has undertaken by these acts to make a system out and out, setting forth the causes for divorce, either from the bonds of matrimony, or from bed and board; defining the mode of preferring the complaint, of making defence thereto, of procuring proofs, and of trying the facts; declaring the effects and consequences of the decree, and prescribing the cases in which alimony is to be allowed. We think, therefore, that if a power exists for granting the application made in this case, it must be collected either from the express enactments, or from the general scope of these statutes.

There is no enactment which expressly confers the power; and those which are express on the subject of alimony, seem rather to deny than to grant it. The first section of the act of 1814, contains an enumeration of the causes on which it may be lawful for the injured person to obtain a divorce either

from bed and board, or the bonds of matrimony, at the discretion of the Court; and the 4th section declares it lawful upon the hearing to determine the petition as to law and justice shall appertain, either by dismissing the petition, or decreeing a divorce from nuptial ties; and provides that "in the case of general divorce upon the petition of the wife," the Court shall have power to decree alimony to her. The 5th section specifies certain causes which shall be sufficient to warrant a decree in favour of the wife, for a divorce from bed and board, and declares that it shall be lawful, upon complaint and due proof made in manner aforesaid, to grant a divorce from bed and board, and also to allow her such alimony as her husband's circumstances will admit. These provisions are evidently restricted to the decreeing of alimony upon the final hearing.

The act of 1814 contained a provision, that no sentence of divorce from the bonds of matrimony should be valid, until ratified by the General Assembly; and the 11th section of the act which points out the mode in which a decree for
(379) alimony shall be enforced, expressly provides, that no process shall issue to carry such decree into execution, until the decree shall have been ratified by the General Assembly. This provision is limited, we presume, to decrees for alimony connected with a decree of a divorce from nuptial bonds, but it is nevertheless indicative of the legislative understanding, that alimony was not allowed until the final hearing of the cause.

There were provisions in the act of 1814, which bore with peculiar hardship on the wife; and as practice under the act brought these to notice, they were subsequently repealed or modified. The act of 1814, imposed a tax of ten pounds, upon the party cast in a petition for a divorce; and required of the petitioner in every case, to find adequate security to respond the costs of suit, before the suing out of process. But the act of 1824, repeals the tax, and dispenses with the bond whenever the petitioner shall make oath that he or she is not worth the sum of two hundred dollars.

The acts subsequent to that of 1814, have made also peculiar provisions for the benefit of the wife. The act of 1819 (*Rev. c.* 1007) gives to her, when obtaining a decree

of separation from bed and board, the capacity to acquire, retain, and dispose, of all such property as might be procured by her industry, or accrue to her in any other way, free from the dominion or control of her husband; and makes the property, on her death without a disposition thereof by her, transmissible to her heirs and next of kin.

Since the passing of the act of 1814, as far as we are informed, no practice has obtained, when the wife sued for a divorce, of making allowances for alimony previously to a decree upon the hearing; and it can scarcely be doubted but that such a practice would have prevailed, had it been supposed to be authorized, or that the legislature, while acting from time to time, in order to render redress to injured wives more ample and more easy, would have authorized such allowances, if they conceived it proper that they should be made.

It may be, that inconveniences are sometime sustained by an injured woman, while suing for a separation from her husband, for want of a provision for support (380) before sentence. But she is not wholly without protection. If abandoned by her husband, or compelled by cruelty to flee from him, the law gives her a credit, for the means of subsistence, suited to his condition in life, and will compel the husband to pay those who shall furnish the requisite supplies. If she has no separate property, she can carry on the suit *in forma pauperis;* counsel will be assigned her who will charge no fees; and she will have the services of the officers of the Court, and the attendance of witnesses without costs.

It is probably better for both parties, that pecuniary means for carrying on the domestic war should not be furnished by law. The prospect of such a supply may subject the husband to vexatious and unfounded suits, and prove a mistaken kindness even to the wife, who has just cause of complaint. Instead of relying on the counsel and aid of disinterested friendship, she may be tempted to put herself under the direction of mercenary allies, who will exasperate differences that might be adjusted, into irreconciliable dissentions; and under the pretext of vindicating her wrongs, prosecute their own schemes of cupidity.

But whatever may be the course dictated by policy, until

the legislature shall have otherwise provided, we think the Courts are not authorized to make allowances for alimony, before the complaint of the wife shall be finally tried.

We are not called upon to say, whether there may not be cases in which the husband is an applicant for a divorce, and is endeavouring to stigmatize his wife with foul imputations, where the Court may withhold its aid from him, unless he will furnish the means of a fair investigation. We do not say how this may be, and are to be understood as intimating no opinion upon it.

We are of opinion that the decision of the Court below is correct, for the reasons already mentioned. But if the Court had a discretion to make the allowance, this is a case in which, in the present state of the pleadings, the Court could not be invoked to make it. The petitioner charges that

(381) her husband has treated her in a *cruel and barbarous* manner, and has offered *such* indignities to her person, *as* to render her condition intolerable and life burthensome. But she sets forth no specific treatment as *cruel,* She shows no indignities. She alleged *no facts* in relation to these charges, which can be properly put in issue. On such a petition, so vague, no Court ought, upon any proofs, to decree a divorce. And where, upon the face of the petition, it is seen that a separation is not to be decreed, the Court ought not, if it had the power, to order alimony *pendente lite.*

It is to be certified to the Court below, that there was no error in the interlocutory order appealed from.

PER CURIAM. Judgment affirmed.

Cited: Taylor v. Taylor, 46 N. C., 530; *Everton v. Everton,* 50 N. C., 206; *Earp v. Earp,* 54 N. C., 119; *Schonwald v. Schonwald,* 62 N. C., 219; *Webber v. Webber,* 79 N. C., 574; *Hodges v. Hodges,* 82 N. C., 123; *Reeves v. Reeves, Id.,* 349; *Morris v. Morris,* 89 N. C., 112; *Moore v. Moore,* 130 N. C., 334.

ELIZABETH DAVENPORT v. SAMUEL C. SLEIGHT.

An instrument signed and sealed in blank, and handed to an agent verbally authorized to fill up the blank and deliver it, is not the deed of the principal; and after declarations of the principal, approving of the delivery by the agent, made in the absence of the instrument, and without any act in relation to it, will not amount to an adoption and ratification of the delivery.

Debt upon a single bond for one hundred dollars. Plea, *non est factum.*

On the trial, before *Toomer, J.,* at Tyrrell, on the last Circuit, the only question was as to the execution of the bond. It appeared that one Frasier brought the bond to the house of the plaintiff, already written excepting a blank for its amount, and signed and sealed by the defendant. Frasier, as the agent of the defendant, made an agreement with the plaintiff for the purchase of a vessel, whereupon he filled up the blank with the agreed price, attested the instrument, and delivered it to the plaintiff. After the vessel had come into the possession of the defendant, he admitted that he had signed and sealed the instrument in blank, and had sent Frasier to the plaintiff to make the best bargain he could, and had verbally authorized him to fill up the blank, and deliver it as his, the defendant's bond. (382)

His Honor, upon the authority of the case of *M'Kee v. Hicks,* 13 N. C., 379, intimated an opinion that these facts did not constitute the instrument the deed of the defendant; and the plaintiff in submission to that opinion, suffered a nonsuit, and appealed.

Haughton, with whom was *Devereux,* for the plaintiff.
No counsel appeared for the defendant in this Court.

RUFFIN, Chief Justice: The instrument sued on is not, in the opinion of the Court, the bond of the defendant. When put into the hands of Frasier, it was not a deed, because it was imperfect and did not purport to oblige the payment of any sum of money. The parol authority to Frasier to fill up the blank with the sum that might be agreed upon as the price of the vessel, we think, is not a valid authority

to deliver the paper, thus completed, as the deed of the defendant. Being executed in his absence it does not bind the defendant. The case of *M'Kee v. Hicks,* 13 N. C., 379, is directly in point. It is authoritative as a decision of this Court; and it must be admitted that the point was before, at the least, not clear on the side of the plaintiff. But upon reconsideration, we agree to the doctrine of that case as that of the common law. The ancient rule is certain, that authority to make a deed cannot be verbally conferred, but must be created by an instrument of equal dignity. It is owned, that there are modern cases, in which it seems to have been relaxed with respect to bonds. This began with the case of *Texira v. Evans,* cited 1 Anst., 229, note, on which all the subsequent cases profess to be founded. The Court is not satisfied with the reasons assigned for those opinions, but entertains a strong impression that they lead to dangerous consequences. Because bonds are in frequent use as mercantile instruments and are negotiable, it seems to have been thought that they may be safely treated as if altogether of that character. If they can be filled up upon a verbal authority, the step is, indeed, a short one to allow the holder to do so; and a bond may be made by signing and sealing (383) a blank piece of paper, as a promissory note may be by signing it. We think the difference is in the solemnity of the instruments. The danger of abolishing that distinction consists in the necessity, that would then arise, of applying the rule as modified, to conveyances and deeds of every description, as well as to this particular kind, namely, bonds. No person will argue in favour of a deed of conveyance, in which the name of the bargainee, for instance, or the description of the land were inserted after execution by the vendor and in his absence, although done without corruption, and by some person whom he requested to do it. It would subvert the whole policy of the law, which forbids titles from passing by parol, and requires the more permanent evidence of writing and sealing. A bond is to be regarded as precisely on the same footing with any other deed. To make a bond out and out in the name of another, certainly requires a letter of attorney by deed. A verbal authority to *seal* a bond, is not sufficient. To make the instrument a different one in form and in substance from what

it was, when the supposed obligor parted from it—to make it a sensible, and upon its face, an operative obligation to pay a certain sum out of a writing, which was altogether insensible, and did not bind the obligor to pay any sum—is essentially *to make* the bond. In none of the cases is it suggested, that such acts can be done by a stranger. But it is said, the party ought to be bound, because the words were inserted by his agent. That is assuming the position in dispute. There might be an agency to receive the money or make the purchase, which would in law be sufficient, when there was not an agency to bind the principal by this form of security. The very question is, whether the person, who wrote out the bond and delivered it, was in fact and in law, the agent for that purpose. To determine it, we are obliged to recur to the rule of law, which defines what may create an authority to make a deed, and by what evidence that authority may be established. If it cannot legally exist without a deed, then he who had only a verbal authority, was not in law an agent for this purpose, though he might have been for others.

We think likewise that the defendant has not made it his bond by any subsequent act. If a deed be perfect in its frame, there is no doubt the execution of it by one (384) party, is good, and the instrument will not be invalidated by the execution of another party to it, in the absence of the former. But where it is incomplete when executed, it is well settled that the insertion of the matter, which is necessary to perfect it, avoids it as a deed, as first executed and by force of that delivery, unless after the alteration there be a redelivery, or that which is tantamount to it. The case cited for the plaintiff, *Hudson v. Reovelt,* 5 Bing., 368, admits this; and determines only that filling up a blank in the presence of the party and by his assent, is in law a redelivery, contrary to the passage in Buller's Nisi Prius, 267. We see no objection to that position. But it has no application to the case at bar. Here, the defendant never saw the bond after it first came to the plaintiff's hands. Nothing that he could say in the absence of it, could amount to the adoption of it as his deed—the esential requisite of delivery by himself or by his attorney duly authorized, in its altered state, being wanting. But what the defendant did say, is certainly quite

insufficient. It is simply an acknowledgment, that by parol he appointed Frasier his agent, first to buy the vessel, and secondly, to fill up the bond. The acknowledgement of those facts, establishes no more than the proof of them by witnesses would. They very clearly establish a case in which the plaintiff could recover the price of the vessel on the contract of sale. But they show only an insufficient authority to fill up and deliver the bond; and do not in the least, denote an intention of the defendant (if that would do) to be bound by it as his bond; much less amount to a delivery of it as such. It is not, therefore, the deed of the defendant; and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Graham v. Holt, 25 N. C., 302; *Kime v. Brooks,* 31 N. C., 220; *Blacknall v. Parish,* 59 N. C., 72; *Bland v. O'Hagan,* 64 N. C., 472; *Humphries v. Finch,* 97 N. C., 306; *Cadell v. Allen,* 99 N. C., 545.

(385)

MORGAN J. THOMAS v. ABNER ALEXANDER.

1. It is the settled rule of the Supreme Court, to affirm every judgment not seen to be erroneous.
2. The harboring and maintaining a runaway slave, to be within the act of 1791, (*Rev c. 335, s. 4,*) must be secret.

This was an action, upon the case, for harbouring a runaway slave, in violation of the act of 1791, (*Rev. c.* 335, sec. 4). Plea, not guilty.

There was no statement of the facts which occurred at the trial, certified in the record sent to this Court. But it appeared from the transcript, that his Honor *Judge Toomer,* had at Tyrrell, on the last Circuit, instructed the jury "that the plaintiff should satisfy them that he was the owner of the slave, and that the defendant had harboured or maintained him: that a construction had been given to the act of 1791, in the case of *Dark v. Marsh,* 4 N. C., 228, which declared that 'harbouring,' meant a concealment, and that the main-

tenance must be secret: that if they believed from the testimony, that the slave was in the possession of the defendant, or was at his plantation, and was not concealed nor secretly maintained there, the defendant was entitled to their verdict." The jury found for the defendant; and the plaintiff appealed.

No counsel appeared for either party in this Court.

GASTON, Judge: The instructions of the judge, which were excepted to as erroneous, are set forth in the transcript, but it contains no statement of the evidence in reference to which the instructions were given. We might therefore, with propriety affirm the judgment, without examining the instructions, since it is the settled rule of this Court, (whatever inadvertencies to the contrary may have crept into some of its early decisions, when the precise limits of its jurisdiction were not ascertained) to reverse no judgment because it is not shown to be right, but only when it is seen to have been wrong. *Pickett v. Pickett,* 12 N. C., 6. Whether a judgment be rendered erroneous because of a mistake of law in the charge of the judge, it is impossible to see, unless the bearing of that charge upon the facts testified, (386) and the influence which it may have had on the verdict, shall be made to appear. But we have examined the instructions, and are of opinion that they are unobjectionable in point of law, and in conformity to the principles heretofore laid down in the case of *Dark v. Marsh,* 4 N. C., 228.

The judgment below affirmed with costs.

PER CURIAM. Judgment affirmed.

Cited: Brown v. Kyle, 47 N. C., 443; *State v. Burke,* 49 N. C., 8; *Young v. McDaniel,* 50 N. C., 104; *Chasteen v. Martin,* 84 N. C., 395.

JOHN SNEAD v. JAMES RHODES, Admr of STEPHEN SMITH.

The return of satisfaction to a *fi. fa.* issuing on a judgment, is conclusive upon a *scire facias* to revive such judgment; and the only way in which such return can be got rid of, is by an application to the Court to amend it.

The cases of *Pigot v. Davis*, 10 N. C. 25, and *Governor v. Switty*, 12 N. C. 153, Approved.

The plaintiff sued out a *scire facias*, to revive a judgment, recovered by him in an action of debt, against Calvin R. Blackman, Stephen Smith, and John Barfield; on which the sheriff returned that he had made it known to the defendant, the administrator of said Smith, deceased, but could not find Blackman or Barfield. The plaintiff then entered a *nolle prosequi* as to the two latter, and declared against the present defendant alone, who pleaded *nul tiel record,* and payment.

On the trial of the latter issue before the jury, the defendant gave in evidence a receipt for the whole sum for which the judgment was given, executed by the plaintiff to Blackman, one of the original defendants, and expressed to be in satisfaction of the said judgment. The defendant also gave in evidence a transcript of the record of the original suit, and of the executions and proceedings had therein. It thereupon appeared that the plaintiff had sued out a writ of *fieri facias,* on the said judgment, bearing *teste* in April term, 1828, and returnable to the following October term, and (the said Blackman being the sheriff) delivered
(387) the same to the coroner; and that the coroner returned thereon at the next term, that he had made the moneys as therein he was commanded, and that the said debt and costs were satisfied; and annexed to his said return as a part thereof, a receipt from the plaintiff to him, the coroner, in full of all the money due on that execution.

The plaintiff, to sustain the issue on his part, then offered the testimony of Willis Hall, the said coroner; and he deposed that no money was in fact paid by the said Blackman, to the plaintiff or to himself, nor any paid by him to the plaintiff; but that Blackman as sheriff, then had in his hands an execution against one Collier, the agent of the plaintiff, at the

instance of a third party, and agreed with the plaintiff, to pay for him thereon, a sum equal to the amount due on the execution in favour of the plaintiff, in which Blackman was the principal debtor; and thereupon, Blackman and the plaintiff exchanged receipts for those sums, and the plaintiff also acknowledged satisfaction on his execution in the hands of the witness, and directed him to return it *satisfied;* and he accordingly did so. To this evidence the defendant objected, but the Court admitted it, in explanation of the receipts.

His Honor *Judge Saunders,* at Wayne, on the Spring Circuit of 1836, instructed the jury, that in law, there was no payment of the judgment, and that the plaintiff was entitled to their verdict; which the jury gave; and from the judgment thereon, the defendant appealed.

In the argument, it seemed to be the object of both parties, to have the case determined upon the merits, and to get the opinion of the court, whether, upon all the facts, the defendant was in law discharged? but it was suggested that, perhaps, the question could not be decided upon the plea of payment generally, as that made an issue upon the very fact, and the record was only evidence; but that the defendant ought to have pleaded the whole matter specially as being a satisfaction of record, and relied upon the record by way of estoppel. This being taken up by the plaintiff, and insisted on, the defendant then urged that there could be no judgment on this *scire facias,* but that the judgment of the Superior Court must be reversed, because, (388) upon a judgment against three, there cannot be execution against one of them, unless the record show a sufficient reason for not proceeding against the others. The parties, in order to bring back the case to the question which was intended to be made, and would decide it conclusively, then agreed to amend the record, first, by adding to the return of the sheriff on the *scire facias,* that Blackman and Barfield were dead; and secondly, by framing the issue so as to make the defendant rely on the receipts of the plaintiff, and the return of the coroner, by way of estoppel, as a satisfaction of record; to which the plaintiff then replied *nul tiel record.*

W. C. Stanly, and *Badger,* for the defendant.
Devereux, and *J. H. Bryan,* for the plaintiff.

RUFFIN, Chief Justice, having stated the case as above, proceeded: When the case was first presented, it occurred to us, that the defendant could avail himself of the satisfaction appearing of record, upon the plea of *nul tiel record;* as the *scire facias,* after stating the judgment, "as by the record and proceedings thereon remaining, &c., appears," avers further, that "said judgment still remains in full force and effect, not reversed, satisfied or vacated." But upon looking slightly into the books we find, it is not certain that the *scire facias* should contain this latter allegation. Com. Dig. Pleader, 2 W. 12; 1 Saund., 330, n. 4. And perhaps it is most proper, that the matter of discharge should be brought forward by direct averments on the part of the defendant. We have not thought it worth while to satisfy ourselves how the point is, because upon the pleadings as they now stand, the Court is of opinion that the judgment must be reversed, because the judgment is in law satisfied of record.

If the plaintiff had acknowledged satisfaction of record, the judgment would be thereby discharged. This is the same thing. Writs of execution when returned are, together with the returns, part of the record in this state. *Pigot v. Davis,* 10 N. C., 25. The return of satisfaction by the sheriff, it was said in *Governor v. Twitty,* 12 N. C., 153, is con-
(389) clusive; and while it stands, the plaintiff has no remedy against the defendant. The agreement of a sheriff, to return an execution satisfied, without receiving the money, does not bind the plaintiff. But his return that he has levied the money does; for after that, no other execution can issue until there is a further adjudication by the Court. Such adjudication cannot be given incidentally, in any other or the same Court, when a party is proceeding on the record; for it is conclusive of all things appearing in its present form, and cannot be explained or impeached collaterally upon evidence. The only manner in which the plaintiff could get clear of it, is by a motion to amend the return of the coroner; which would be heard like a motion to vacate an acknowledgment of satisfaction of record by the party. Either, upon a proper case, may be allowed; though it is scarcely conceivable that in such a case as this, it would be against a surety and the coroner, where the creditor made a new contract with

the principal debtor, and upon the strength of it, directed, in his own person, the return that was made. We have doubted whether all the facts taken together, did not amount to evidence of payment as first pleaded. But as the case is now made, the evidence of the coroner was improper; and we are clear that as stated in the defendant's plea, the judgment is satisfied, as by the record now remaining, &c., fully appears.

The judgment of the Superior Court must, therefore, be reversed, and the cause remanded for further proceedings in that Court.

PER CURIAM. Judgment reversed.

Cited: *Poor v. Deaver,* 23 N. C., 393; *Walters v. Moore,* 90 N. C., 45.

(390)

THE STATE v. JOHN HANEY.

1. The unsupported testimony of an accomplice, if it produces entire belief of the prisoner's guilt, is sufficient to warrant a conviction. And the usual direction to the jury not to convict upon it, unless supported by other testimony, is only a precautionary measure to prevent improper confidence being reposed in it; and the propriety of giving this caution must be left to the discretion of the judge who tries the cause.

2. When there are several counts in an indictment, the state *may* be ruled to elect upon which the trial shall be had; but this is done only to prevent injury to the accused where the counts contain charges of distinct offences, but never where there are only variations in the mode of charging the same.

3. Where an association for a criminal purpose is proved to exist, the acts of one of the associates in furtherance of that purpose, as well as his declarations in respect of it, are admissible against the others; and this where the act or declaration is subsequent to the actual perpetration of the crime.

4. A judge is not bound to recapitulate all the evidence to the jury; it is sufficient for him to direct their attention to the principal questions which they have to investigate, and to explain the law applicable to the case; and this particularly, when he is not called upon by the counsel to give a more full charge.

5. An indictment under the act of 1779, (*Rev. c. 142.*) which charges the seduction of a slave to be with an intent "to sell, dispose of and convert to his own use," is sufficient. For the felony created by the

act, is sufficiently described by charging the seduction to be with an intent "to sell;" and the words, "dispose of and convert to his own use," do not extend the intention imputed, beyond that of an intention to sell, and at worst, are only redundant.

6. And charging the taking to be "by violence, seduction and other means," is not repugnant, as both violence and seduction may have been used; but if it were double, it is aided by a verdict finding the taking to be by seduction only.

7. The words, "other means," if used alone, would be too indefinite; but taken in connection with the words, "by violence and seduction," they are merely superfluous.

8. A count on the act of 1779, for the seduction of a slave, need not charge him to be of any value.

The prisoner, with two others, were indicted at Rutherford, on last Circuit, as follows:

"The jurors for the state upon their oath present, that John C. Hardin, John Haney and John W. Williams, all of, &c., on, &c., with force and arms, in, &c., one negro man-slave, by the name of Eli, then and there being the property of Nancy Davis, of the value of fifty dollars, feloniously did steal, take and carry away, contrary to the form of the
(391) statute in such case made and provided, and against the peace and dignity of the state.

"And the jurors aforesaid, upon their oath aforesaid, do further present, that the said John C. Hardin, John Haney and John W. Williams, on, &c., with force and arms, in, &c., one other man-slave, named Eli, then and there being the property of, &c., and then and there in the possession of, &c., feloniously by seduction, violence and other means, him, the said man Eli, slave as aforesaid, against the will and consent of her, &c., did take and convey away from the possession of her, the said owner, with an intention the said slave to sell, dispose of and convert to their own use, contrary to the form, &c., and against the peace, &c."

Haney, by consent, was tried alone; and before the jury were impannelled, it was moved for the prisoner, that the solicitor should elect upon which count of the indictment the trial should be had; but his Honor *Judge Pearson* disallowed the motion. Besides those necessary to prove title in the prosecutrix, &c., the only witness for the prosecution, was one Robins, who was an accomplice, and who detailed at great length all the particulars of the seduction of the slave.

He stated that the plan for the seduction, was devised by Hardin and himself; that after the slave came into their possession, he, the witness, carried him to South Carolina and sold him. He was proceeding to state the particulars of the transaction, when he was asked by the prisoner's counsel, whether he had seen the prisoner after the plan was matured; he answered that he had not until his return from South Carolina, when he met the prisoner and Hardin, and divided the proceeds of the sale. It was objected for the prisoner, that testimony of intermediate acts was not admissible against him; but the objection was over-ruled. Other witnesses were called on both sides, but their testimony was either to confirm or impeach Robins; and the result of the evidence in the case was, that the guilt of the prisoner depended upon Robin's credibility.

His Honor instructed the jury, "that an accomplice was a competent witness; but that it was not safe to convict upon the testimony of an accomplice, unless it (392) was supported in some of its material parts, by the testimony of other witnesses, so as to carry to their minds full and entire conviction of its truth." The counsel for the prisoner, prayed his Honor to instruct the jury, that they ought not to find the prisoner guilty upon the testimony of Robins, unless his testimony as to the agency of the prisoner in the transaction, was supported by the testimony of other witnesses. This instruction his Honor refused to give, but charged that the law did not make such confirmation indispensable, although it would be more satisfactory; and that if the evidence of the accomplice, from the manner in which it was given, and from the support which his general narrative received from other testimony, carried to their minds full and entire conviction of its truth, it was sufficient to authorize a verdict against the prisoner, although the narrative was not supported by other evidence to that part of it in which the prisoner was stated to have had a personal agency.

The prisoner was acquitted upon the first count, and convicted upon the second; the words of the entry of the verdict being, "who find the defendant guilty of the felony and seduction in manner and form as charged in the second count of the bill of indictment, and not guilty in manner and form as charged in the first count of said bill."

A new trial was moved for—1st. Because the judge refused to instruct the jury to acquit the prisoner, unless the evidence of Robins was corroborated as to the prisoner's agency in the transaction.

2nd. Because the judge recited the testimony for the prosecution, and did not recite that for the defence. This motion being over-ruled, a motion in arrest of judgment was made: 1st. Because the indictment did not set forth the offence as described by the statute—it charging the seduction to be "with an intention to sell, dispose of and convert to their own use"—whereas the words of the statute were "with an intention to sell or dispose of to another, or appropriate to his own use."

2nd. Because the indictment was double, and repugnant in charging the taking to be "by violence, seduction
(393) and other means;" and, also, because the intent charged was to "sell, dispose of and convert to their own use."

3rd. Because the slave was not charged to be of any value. This motion being also over-ruled, and judgment of death pronounced, the prisoner appealed.

No counsel appeared for the prisoner.
The *Attorney-General,* for the state.

GASTON, Judge: We have deliberately considered of all the objections presented on this record to the regularity of the conviction of the prisoner.

The indictment contains two counts. The first charges "that John C. Hardin, John Haney and John W. Williams, on 1 Jan., 1837, with force and arms, in the county of Rutherford, one negro man slave, by the name of Eli, then and there being the property of Nancy Davis, of the value of fifty dollars, feloniously did steal, take and carry away, contrary to the form of the statute in that case made and provided, and against the peace and dignity of the state;" and the second charges "that the said John C. Hardin, John Haney and John W. Williams, on the day and year aforesaid, with force and arms, in the county aforesaid, one other man slave, named Eli, then and there being the property of Nancy Davis, and then and there in the possession of her, the said

Nancy, feloniously by violence, seduction and other means, him the said man Eli, slave as aforesaid, against the will and consent of her, the said Nancy Davis, owner as aforesaid, did take and convey away from the possession of her, the said owner, with an intention the said slave to sell, dispose of and convert to their own use, contrary to the form of the statute in that case made and provided, and against the peace and dignity of the state." The said John C. Hardin, John Haney and John W. Williams having been arraigned, pleaded not guilty; and, by consent of the counsel for the state and of the prisoner, *he* was put upon his trial, separate and alone from the other two persons accused. The prisoner thereupon, by his counsel, prayed the Court that the solicitor for the state should elect upon which of the two counts he would try the prisoner; which prayer was over-ruled by the Court. The prisoner was then tried and found "guil- (394) ty of the felony and seduction in manner and form as charged in the second count of the bill of indictment, and not guilty in manner and form as charged in the first count of said bill."

It is no objection on a demurrer, and is certainly, therefore, not good in arrest of judgment, that several felonies are charged against a prisoner in the same indictment, for on the face of an indictment, every distinct count *imports* to be for a different offence. It is, however, in the discretion of the Court, to quash an indictment, or compel the prosecutor to elect on which count he will proceed, when the counts charge offences *actually* distinct and separate. They exercise this discretion, lest the prisoner should be confounded in his defence, or be prejudiced in his challenges to the jury; for he might object to a juryman trying one of the offences, when he would have no objection to his trying the other. But in this case, there was no pretext for asking this indulgence of the Court, as the indictment accused the prisoner but of one criminal act, charged under different modifications, so as to correspond with the precise proofs that might be adduced. The prisoner could not pretend, that these modifications of the charge increased the difficulty of making a fair defence; or prejudiced him in his challenges.

The evidence offered on the trial, if believed, established a case of a concerted scheme between the prisoner and Har-

din, to seduce the negro slave Eli from the possession of his mistress, and carry him to the state of South Carolina, to be sold, for their benefit, and that of their associates. The principal witness for the state, an accomplice in the crime, testified to the seduction and procuring of the negro by the prisoner, and to the arrangements made between the prisoner, Hardin, and himself, for the conveying away of the negro; and was proceeding to testify as to the manner in which the negro was conveyed away and sold, in which part of the transaction the witness was the principal agent, when he was asked by the prisoner's counsel, whether he had seen the prisoner, after the making of these arrangements, and answered that he had not, until after his return from
(395) South Carolina. The prisoner's counsel then objected to any evidence being given against the prisoner, of what was done by the witness in the intermediate time. This objection was overruled; and the witness proceeded to state circumstantially his journeying on with the negro; his attempt to sell him to one person; his subsequent sale of him in South Carolina; his return to this state; and his here meeting with the prisoner and Hardin, and dividing with them, the proceeds of the sale. We are of opinion, that there was no error in receiving the testimony objected to. That one man should not be criminally affected by the acts or declarations of a stranger, is a rule founded in common sense, and resting on the principles of natural justice; and therefore a mere gratuitous assertion by any one, inculpating himself and others as fellow conspirators, should never be received as evidence against any person but himself. But where a privity and community of design has been established, the act of any one of those who have combined together for the same illegal purpose, done in furtherance of the unlawful design, is, in the consideration of law, the act of all. 2 Stark. Ev., 233, 234, 235. The cases in which this doctrine is most frequently applied, are those of treason and conspiracy, where it is perfectly settled, that after proof of the *association* for a traitorous or illegal purpose, the declarations, acts and conduct of all the associates, in furtherance of their common purpose, is evidence against each and every of them. But it is not confined to indictments for treason and conspiracy. It is immaterial what is the nature of the indictment, pro-

vided the offence involve a conspiracy. Thus, upon an indictment for murder, if it appear that others, together with the prisoner, conspired to perpetrate the crime, the act of one, done in pursuance of that intention, is evidence against the others. See *State v. Poll,* 8 N. C., 442. The only plausible objection to the testimony received, is, that it was unnecessary; for that the crime charged against the prisoner consisted in the *taking* of the slave, with a felonious *intent,* and *that* crime could not be varied by any acts done by another, though with the concurrence of the prisoner, subsequently to the taking. But it is plausible only. If (396) the objection were well founded, it would apply to evidence of his own acts, subsequent to the original taking; for they cannot impress a *new character* upon the original taking. But such acts, whether done by himself, or by his agent, are material and relevant, as tending to manifest the character and design of the original act. They are the accompanying, surrounding, and consequent circumstances of a transaction, the more of which is known, the more thoroughly the transaction itself is understood; and they furnish the means, by their concurrence with, or opposition to, other matters given in evidence, of testing the veracity and accuracy of the witnesses by whom they are testified.

Two exceptions have been taken to the charge of the judge. 1st, For that the Court refused an instruction which was prayed for, that the jury ought not to find the prisoner guilty upon the evidence of an accomplice, unless that evidence was corroborated as to the agency of the prisoner in the transaction; and 2dly, For that the Court recited the testimony on the part of the state, without reciting any of the testimony on the part of the prisoner.

In relation to the matter of the first exception, it appears that his Honor instructed the jury, that an accomplice was a competent witness, but it was unsafe to find, and a jury ought not to find, a verdict of guilty, upon the evidence of an accomplice, unless that evidence was supported in some of its material parts by other evidence, so as to carry to the minds of the jury a full and entire conviction of its truth; and being specially called upon to instruct the jury that the evidence of an accomplice, although supported in material parts of the general narrative, must also be supported in ma-

terial parts as to the personal agency of the prisoner, declined to give the instruction as prayed; and charged the jury, that the law did not make such a confirmation indispensable, although it would be more satisfactory; and that if the evidence of an accomplice, from the manner in which it was given, and from the support which his general narrative received from other testimony, carried to the minds of
(397) the jury full and entire conviction of its truth, it was sufficient to authorize a verdict against the prisoner, although the narration was not supported by other evidence, in that part of it in which the prisoner is stated to have had a personal agency.

This Court understands the rule of law to be, that the unsupported testimony of an accomplice, if it produce undoubting belief of the prisoner's guilt, is sufficient to warrant a verdict affirming his guilt. Such is certainly the law of the country from which we have derived the principles of our jurisprudence. It is so laid down by Hale, 1 Pleas of the Crown, 305, although he adds, that it would be *hard* to take away the life of a man upon it. The doctrine is explicitly stated in Hawkins, B. 2, ch. 46, sec. 92, with the remark, however, that "it seems to be the general opinion, that unless some fair and unpolluted evidence corroborate and give verisimilitude to the testimony of an accomplice, a person convicted under such circumstances, ought to be recommended to mercy." The very point was solemnly adjudged by the twelve judges of England, in *Atwood and Robin's Case,* 1 Leach's Cro. Ca., 464, who held unanimously, that an accomplice is a competent witness; and if the jury, weighing his testimony, think him worthy of belief, a conviction, supported by such testimony alone, is perfectly legal. The same was afterwards held in *Durham and Crowder's Case,* 1 Leach's Cro. Ca., 478; and in the case of *Rex v. Jones,* 2 Camp., 132, *Lord Ellenborough* observed, that "no one can seriously doubt that a conviction is legal, though it proceeds upon the evidence of an accomplice only. Judges, in their discretion, will advise a jury not to believe an accomplice, unless he is confirmed, or only so far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts he deposes. It is allowed, that he is a competent witness; and the consequence is inevitable, that if credit be

given to his testimony, it requires no confirmation from another witness." We are not aware of any judicial decision in our country, at variance with the rule brought hither by our ancestors. It is impliedly recognized in *State v. Twitty,* 9 N. C., 449, where the Chief Justice, deliver- (398) ing the opinion of the Court, that a witness might be called to support the credit of an accomplice, before the latter had been attacked, because he was necessarily exposed to suspicion, by reason of his being an acknowledged accomplice, observes, "though an accomplice is a competent witness, yet his unconfirmed evidence is *usually received with caution,* and distrusted by a jury;" and in the *State v. Weir,* 12 N. C., 363, the rule is referred to by the Court, as being now perfectly settled: "It is now settled, that his evidence," (the evidence of an accomplice) "may be left to the jury, who, if they believe him, may convict the prisoner."

If this be the settled rule, it follows, necessarily, that the exception taken cannot be sustained; for no one can *require* of the judge to give an instruction to the jury, except on the *law* of the case. The judge may caution them against reposing hasty confidence in the testimony of an accomplice. It is usual—justifiable—and, we add, it is *proper* to do so, where he has cause to apprehend that the jury may feel themselves bound to find a verdict conforming to the positive testimony of the witness, without weighing the circumstances of suspicion and distrust under which his testimony is rendered. Long usage, sanctioned by deliberate judicial approbation, has given to this ordinary caution a precision which makes it approach to a rule of law. Jurors are advised, that it is deemed hard, and that it is unsafe to convict on the testimony of an accomplice, unless that testimony receive material support from evidence derived *aliunde,* coinciding with it in *considerable* circumstances, as to leave no rational doubt in their minds of its truth. In what parts of the details of the testimony this confirmation should be had, in order to remove the jealousy and suspicion to which the testimony is exposed, and to create such a degree of confidence in the general credibility of the witness, as to command faith in those parts of his narrative where he is not thus supported, the judge has not the right to direct or advise the jury. Speculative writers have indeed undertaken with much ingenuity to devise rules

of faith on the subject, but the law is wholly silent
(399) concerning them. Tolerating and approving of the general caution, it trusts the application of the caution, under all the circumstances testified, wholly to the intelligence and integrity of the jury.

With respect to the matter of the second exception, it appears from the judge's charge, which is spread upon the record, that his Honor did not undertake to recapitulate the evidence to the jury, but only to direct their attention to the important questions which they were called upon to investigate; and to explain to them the law applicable to the case. It is not stated that he was called on, either by the state or the prisoner's counsel, to give a more full charge; nor is it seen, that the purposes of justice required it. The great matter in controversy was the degree of credit due to the testimony of Robins; and to us it appears, that with great propriety he called the attention of the jury to the matters in which it was alleged that this testimony was corroborated by that of others —laid down the rule of law thereon benignantly for the prisoner—and fairly left the whole case to the jury, with an injunction to give to every circumstance of it a careful consideration, without any departure from impartiality in collating the evidence, or any intimation of his opinion thereon. See *State v. Lipsey,* 14 N. C., 485. This objection to the charge seems to us, therefore, also unfounded.

Several objections were urged below in arrest of judgment, because of insufficiency, uncertainty, and repugnancy in the count whereon the prisoner was convicted; and others have presented themselves to us, as not undeserving of notice.

In the first place, it is objected, that this count does not bring the offence charged within the words of the statute whereon it is founded. The criminal intention charged in the indictment is, "with intention the said slave to sell, dispose of, and convert to their own use." The offence described in the statute is to "steal, or by violence, seduction, or any other means, take or convey away any slave, the property of another, with an intention to sell, or dispose of to another, or appropriate to their own use, such slave." It was settled,
in *State v. Hall,* 3 N. C., 105, and *State v. Jernagan,*
(400) 7 N. C., 12, that the object of the act of 1779, (Rev.

c. 142) was two fold; 1st, to punish the crime of stealing a slave, with death, by taking away the benefit of clergy, to which the offender was entitled at common law; and secondly, to punish all other means of depriving an owner of his slave, whether by force or fraud, if the taking or conveying away were accompanied with the intention declared in the act, viz: to appropriate to the use of the wrongdoer, or to sell or to dispose of to another—that the words of the statute declaring the intention, do not qualify the crime of stealing, which necessarily means the taking *causa lucri,* but qualify the new felony created by the statute, that of taking or conveying away by seduction, violence, or other means. The criminal intention is declared in the disjunctive—to sell—to dispose of to another—or to appropriate to their own use; and these three purposes seem designed to express all those which characterize a larcenous or felonious intention. To sell, means a disposition of the slave to another, for a price; to dispose of to another, embraces transfers made either gratuitously, or for a price; and to appropriate to their own use, describes the keeping of the slave, to enjoy his services. We hold it, therefore, to be clear, that the felony created by the statute, is sufficiently described, so far as intention is concerned, by charging the act to have been done with intent to sell the slave. As sale is one mode of disposition, there is nothing repugnant in charging the intention to have been to sell *and* dispose of the slave. The latter words are unnecessary, indeed, but, at the worst, they are only redundant, and, in our opinion, do not extend the intention imputed beyond that of an intention to *sell.* Had the charge stopped here, it would have conformed to that which was pursued in the third count of the indictment in the case of *Jernagan,* before referred to. It will be seen, that the indictment there contained three counts, the first charging the prisoner with stealing the slave Amos; the second, with taking him by seduction, with intent to appropriate him to his own use; and the third, with taking him with intent to sell and dispose of him. The counsel for the prisoner took objections to every count in the indictment; but neither they alleged, nor the Court supposed, that the second (401) was objectionable, in charging merely an intention to appropriate to the use of the prisoner, or the third in charg-

ing an intention to sell and dispose of to another. If the words "to sell, dispose of to another, or appropriate to their own use," are to be taken *conjunctively,* both these counts were clearly bad. But the count in question does not stop here. It charges an intention to sell, dispose of, "and *convert,* to their own use. We do not hold the term *convert,* as used in this indictment, to be equivalent to the term *appropriate,* as used in the statute. The latter is employed in the statute, to contradistinguish the use made of the slave, from a sale or disposition of the slave to another, and necessarily means the retaining of him by the wrongdoer. But conversion embraces any unlawful use or disposition made of the slave. A sale is as much a conversion of him, as a detainer from the service of his owner. Following after, and united by the conjunction "and" to the words "sell and dispose of," the conversion here charged, means a conversion *by sale,* and is neither repugnant to the charge of an intention to sell, nor affirmative of any other intention. We hold, therefore, this exception to the count, bad, because we view the *sole* intention charged, to be an intention to sell. Had the count pursued the very words of the statute, "with intention to sell, dispose of to another, *or* appropriate to their own use," it would have been bad, because of *uncertainty.* Had it varied from them, by changing "or" into "and," and charged an intention to sell; dispose of to another, *and* appropriate to their own use, we apprehend, that it would have been bad, because of *repugnancy.*

It is further objected that the indictment is double, and repugnant, in charging that the prisoner took and conveyed away the slave, "by seduction, violence, and other means;" and also in charging the intent to be "to sell, dispose of, and convert to their own use." The latter part of this objection has been disposed of in considering the first objection; the former part of it remains to be examined. There is no *repugnancy* in the accusation, as both seduction and
(402) violence may have been used in carrying into execution the criminal purpose charged; it may have been effected in part by one, and in part by the other means; but it is not so obvious that the indictment is not liable to the objection of duplicity. We are inclined to think that if the objection did exist, it would furnish no sufficient reason for arrest-

ing the judgment. "In civil actions, the usual mode of objecting to pleadings for duplicity, is by special demurrer; it is cured by a general demurrer, or by the defendant's pleading over. In criminal cases, the defendant may object to it by special demurrer, or the Court, in general, upon application, will quash the indictment; but it is doubtful whether he may avail himself of it on general demurrer; it is extremely doubtful if it can be made the subject of a motion in arrest of judgment, or of a writ of error, and it is certainly cured by a verdict of guilty as to one of the offences, and not guilty as to the other." Archb. Crim. Plead., 55. The verdict in this case does not, in express terms, negative the other means charged to have been employed by the prisoner, but we understand it as affirming only that by seduction. It finds the defendant "guilty of the felony and seduction, in manner and form as charged in the second count of the bill of indictment." But however this may be, we are of opinion, that the indictment is not vicious as is objected, because of duplicity. A criminal act may be carried on through the agency of several means, and although it would be equally criminal if but one alone had been used, yet when all have been employed, it is nevertheless but one crime, and it may be charged as one crime, with all its attendant circumstances. Thus, the precedents show us, that under the statute which punishes as a felony, the demanding of moneys, chattels, or valuable securities "with menaces or force," the indictment may set forth the demand to have been made with menaces, or to have been made with force, or to have been made with menaces and force. Archb. Crim. Plead. (5th ed.), 230. So under the statute which makes it felony "by force or fraud," to carry away children under ten years of age from their parents, we find precedents of counts charging the taking by force; others charging the taking by fraud; and others charg- (403) ing the taking by force and fraud. Archb. Crim. Plead. (1st ed.), 257, and same 5th ed., 371. So if an offence be cumulative with respect to the *acts* done, although any one of the acts be sufficient to constitute the crime, the cumulative offence may be charged. Thus under the statute inflicting severe penalties on any persons who shall buy *or* receive certain stolen goods knowing the same to have been stolen, it is the customary form, to charge that the offender

did buy *and* receive such goods. Stubb's Cro. Cir. Com., 414. Thus, also, the statutes against forgery, describe the offence to be "to forge, or cause to be forged, or wittingly aid and assist in the forging of notes," &c. An indictment setting forth in the disjunctive, that the defendant did forge or cause to be forged, is unquestionably bad; while it would certainly be good if it positively charged the offence in either way. *King v. Stocker,* 5 Mad., 137; 1 Salk., 342, 371. Yet all the indictments in the Federal Courts of this Circuit, under the act of Congress, on the forging of United States Bank notes, following the English precedents on a similar act of parliament (see 3 Chitty Crim. Law, 1052) charge cumulatively in one count, that the defendant did falsely make, forge, and counterfeit, and cause and procure to be falsely made, forged and counterfeited, and wittingly aid and assist in the falsely making, forging and counterfeiting. The entire criminal act done, may have consisted of all these parts, and therefore, it may be set forth as such in one count. It is our opinion, that but a single offence was described in the count whereof the prisoner was convicted: that this offence consisted of parts: that the prisoner could not rightfully object to the accusation as double, because the whole of the offence was set forth; and is liable to the penalty denounced by the statute, because found guilty of so much thereof as brings his crime within its penal enactments.

Connected with the objection which has been last considered, is one not so distinctly stated as a reason in arrest, but which we have felt it our duty to examine. The second count charges the taking and conveying away to have
(404) been by seduction, violence, "and other means." If these latter words are to be regarded as constituting a material part of the accusation upon which the prisoner has been convicted, it would follow, we think, that the indictment is too vague, to warrant any judgment thereon. Certainly an indictment upon this branch of the statute would be essentially defective, if it omitted to specify any means by which the taking and conveying away were effected. And if these words constitute a material part of the charge, they would seem to render the accusation almost as general as though it contained no specification of the means. We feel very reluctant to sanction any apparent departure from that cer-

tainty in criminal accusations, and that propriety of language generally demanded in them, the observance of which furnishes one of the best securities against oppression; but after full consideration, we deem ourselves bound to hold that this indictment does specify seduction and violence as means that were employed, and the allegation of other means not specified, must be considered as surplusage. There is a marked difference between the omission in an indictment, of any fact or circumstance, which is a legal ingredient in the offence, and the addition to an offence already legally set forth, of other matters which do not describe an offence. The defendant's plea denies only the matters charged; no evidence can be received of an ingredient not charged, and no verdict can find it. The omission is, therefore, fatal. But the traverse distinctly puts in issue the offence sufficiently and specifically set forth in the indictment; evidence to support the specific charge is indispensable to a conviction; and the verdict of guilty directly affirms that charge. Therefore is it, that if an indictment be *certain* in some particulars, and *uncertain* as to others, it is void only as to those which are uncertainly expressed, and good as to the residue. Hawkins, Book, 2, ch. 25, sec. 74. And nothing which may be rejected as surplusage and *immaterial* shall hurt the indictment. Same, sec. 79. If one were convicted upon an indictment for that with force and arms, he had done many grievous wrongs to a certain A. B., no judgment could be rendered thereon; but it is every day's experience, that (405) judgment may be rendered on a conviction for an assault and battery on A. B., although the indictment also avers that he then and there did many other grievous wrongs to the said A. B. An indictment for stealing divers goods and chattels (one of the instances put by Hawkins) would be unquestionably bad; but had it charged the stealing of a specific chattel and of divers others, a conviction would establish the precise theft imputed, and warrant the sentence of the law thereon.

It is lastly objected, as a reason in arrest of judgment, that the value of the negro is not set forth in the second count. We are of opinion that it is not necessary in *that* count, that the value should be stated. Larceny, at common law, is either grand or petit larceny, according to the value

of the thing stolen; and in indictments for larceny, the value is always averred so as to enable the Court to ascertain the character and grade of the offence, both in the management of the trial, and in the rendering of sentence after conviction. Whether an indictment at common law for larceny, would be absolutely bad, when the value of the article stolen is not stated in it, or might be sufficient to justify a judgment for petit larceny, may not be a question altogether free from doubt. It would be a hazardous experiment to omit it. In the first count of this indictment, which we have seen is for grand larceny, known as such before the statute, and upon which the statute had no other operation than to take away its clergiable privilege, the value is very properly set forth; and an omission of it would, we apprehend, have been a fatal defect. But the second count is not for a larceny, and could not be supported as a charge of larceny, from the want of the indispensable term, *steal*. 1 Hale, 504. It is for a felony created by the statute; and the statute makes it a felony to take or convey away negroes, the property of others, with any of the intents which it describes, without regard to the value of the negroes, and whether they be or be not of any value.

There is another objection to the indictment, not indeed, of a weighty character, except that the precise forms (406) of criminal accusations are *always* important, but which we notice lest it might be supposed to have been overlooked. The entire phrase "him, the said man, Eli, slave as aforesaid," in the second count, is unnecessary and ungrammatical. It is unnecessary, for the *residue* of the count explicitly charges that John C. Hardin, John Haney, and John W. Williams, a certain man slave named Eli, the property of Nancy Davis, feloniously, by seduction, violence, and other means, did take and convey away. It is ungrammatical for the action of the verbs "take and convey away," having been spent on the object "one other man slave named, Eli, the property of Nancy Davis;" "him the said man Eli, slave as aforesaid" is brought in as an object without any verb, by which it is governed. But it cannot avail to arrest the judgment, for not only may it be rejected as wholly superfluous and unnecessary, but because violations of grammar, do not furnish a sufficient objection to the rendition of judg-

ment, if, from the whole tenor of the charge, the statement be sufficiently clear to furnish an intelligible description of the offence, and of the manner of committing it.

Upon full consideration of all that has been objected, or which we could ourselves suggest in behalf of the unfortunate prisoner, we see no error in the proceedings to save him from the sentence of the law. This opinion must be certified to the Superior Court of Rutherford, with instructions to pronounce sentence of death upon the verdict.

PER CURIAM. Judgment affirmed.

Cited: State v. Hardin, post, 411; *State v. Cowan,* 29 N. C., 245; *State v. Williams,* 31 N. C., 152; *State v. Locklear,* 44 N. C., 206; *State v. Williams,* 47 N. C., 268; *State v. Johnson,* 50 N. C., 223; *State v. Jenkins,* 51 N. C., 19; *State v. Hailey,* 51 N. C., 43; *State v. Harper,* 64 N. C., 131; *State v. Eason* 70 N. C., 92; *Aston v. Craigmiles, Id.,* 318; *State v. Caveness,* 78 N. C., 487; *State v. Chavis,* 80 N. C., 358; *State v. Reel, Id.,* 443; *State v. Grady,* 83 N. C., 647; *State v. Holland, Id.,* 625; *Buxley v. Buxton,* 92 N. C., 484; *Ferrall v. Broadway,* 95 N. C., 557; *State v. Stroud,* 95 N. C., 632; *State v. Miller,* 97 N. C., 487; *State v. Rowe,* 98 N. C., 637; *State v. Mitchener, Ib.,* 694; *State v. Watkins,* 101 N. C., 705; *State v. Parish,* 104 N. C., 687; *State v. Harris,* 106 N. C., 686; *Boon v. Murphy,* 108 N. C., 191; *State v. Barber,* 113 N. C., 714; *State v. Register,* 133 N. C., 753.

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STATE v. JOHN C. HARDIN.

1. The evidence of an accomplice is undoubtedly competent, and may be acted on by the jury, as a warrant to convict, although entirely unsupported. It is, however, dangerous to act exclusively on such evidence; and therefore, the Court may properly caution the jury, and point out the grounds for requiring evidence confirmatory of some substantial parts of it. But the Court can do nothing more; and if the jury really yield faith to it, it is not only legal, but obligatory on their consciences to found their verdict upon it.

2. In an indictment for larceny, one cannot be convicted as a principal, unless he were actually or constructively present at the taking and carrying away of the goods. His previous assent to, or procurement of the caption and asportation, will not make him a principal, nor will his subsequent reception of the thing stolen, or his aiding in concealing or disposing of it, have that effect.

3. In an indictment, under the act of 1779, (*Rev. c. 142,*) for seducing and conveying away a slave, it was held by the Court, GASTON, Judge, dissenting, that the seduction, *and* conveying away must concur to constitute the offence; and that one, who did not himself seduce or aid in seducing the slave, but only assisted in the conveying away, could not be convicted as a principal felon.

The prisoner was one of those indicted in Rutherford county, jointly with John Haney, whose case came up to this Court, and has been decided during the present term. The trial was, as to the prisoner Hardin, removed to the county of Burke, where he was convicted upon both the counts in the indictment; the one charging that the prisoner and the others did steal and carry away a negro-slave by the name of Eli, then and there being the property of Nancy Davis; and the other, that "the said John C. Hardin, John Haney, &c., one other negro-man slave named Eli, then and there being the property of Nancy Davis, and then and there in the possession of the said Nancy, feloniously by seduction and violence, against the will and consent of her, the said Nancy Davis, owner as aforesaid, did take and convey away from the possession of her, the said owner, with an intention the said slave to sell, dispose of and convert to their own use, contrary to the form of the statute in such case made and provided, &c."

Upon the trial, the negro in question was proved to be the property of Nancy Davis, as charged in the indict-
(408) ment; and it was also proved, that he was stolen, or seduced or went from her plantation in Rutherford, on the fourth Saturday of July, 1836.

One Robins was then produced as a witness for the state. He testified that on Sunday, the next day after the disappearance of the slave, he saw, at a meeting-house in the neighbourhood, Haney, one of the accused, with whom, as well as with the prisoner, he, the witness, had been acquainted about a year. Haney informed him, that a negro had come to him the preceding night a little before day; and then requested witness to go that evening to the prisoner, Hardin, and tell Hardin to meet him at a place called Webb's old field that night, about an hour after dark; and also that he, the witness, should accompany Hardin. In the course of the conversation Haney remarked, "Hardin has missed the one he has been trying to secure; but good luck will come after bad. Tell him this boy has come to me." The witness made the communication to the prisoner, Hardin; and they went together to the place and at the time appointed, and there found Haney. Upon a whistle by Haney, a large negro-man came up to them; and, in reply to Hardin's question, where did he come from? Haney said, "he came from the widow Davis." Haney then remarked, "You, Robins, must take him off. It will be a safe trip, as the widow has not energy to press like some people. In the mean time Hardin will keep him till you get ready to start." That was then agreed on by the three; and Haney left them—remarking to Hardin, "You know our agreement;" to which Hardin replied, "yes," and added, "it will do." The prisoner, the witness and the negro then went together within half a mile of Hardin's house; when Hardin suggested that there might be some person at his house, and proposed that the negro and the witness should stay in the woods until he should go to see, and return to them. Hardin did not return that night, but came the next morning with food for them. It was then agreed between Hardin, Robins and the negro, that Robins should take the negro to South Carolina and there sell him; that he should go that day, and make his preparations; and (409) that the negro should meet him the next day at a point designated on the road. The witness accordingly proceeded, and on the next day the negro met him according to appointment; and Robins and another associate, named Williams, carried him to South Carolina and sold him for nine hundred dollars; of which part was paid to Williams; and upon the

return of Robins to this state, the sum of one hundred and forty-five dollars was paid to Haney, and two hundred and fifty-five dollars to the prisoner, Hardin. Upon his cross-examination, the witness stated that his habits had been moral and upright until he had become acquainted with the three persons charged in this indictment, who influenced him to join an association which they called a *club,* and represented to have members spread over the country; and that this was his first adventure in the way of selling slaves. But when further pressed, he admitted that he had before sold a free negro, named Wingfield for one thousand dollars, of which he gave two hundred dollars to Wingfield himself for agreeing to be sold; two hundred dollars to a man in South Carolina, for helping him to sell the free negro; one hundred dollars to Haney, and ninety dollars to the prisoner, Hardin; and that he spent the residue himself. He also stated, that when he paid to Haney his share of the price got for Mrs. Davis's negro, Haney said to him and Hardin, "You know our plan is to steal the negro again and sell him over, so you must make up something to pay for doing that:" upon which each of them gave Haney twenty-five dollars more. In the division of the money, Hardin insisted upon having the largest share, in consequence of "his having tried so long to get a negro, in which he met with bad luck."

The witness, in the course of his examination, stated a great number of minute incidents as occurring on his journey; as to which his testimony was sustained, and in some points contradicted, by that of others. But he was not corroborated directly in any part of his testimony relative to the transactions with Hardin in particular.

The counsel for the prisoner, moved the Court to instruct the jury, that they ought entirely to disregard
(410) the testimony given by Robins, the accomplice, because it was not supported, in *any* material part, by which a personal agency of Hardin was shown. The counsel further moved the Court to instruct the jury, that if they should believe the said evidence of Robins, yet they ought not to find the prisoner guilty; because upon that evidence the prisoner was not a principal in the felony committed, but only an accessory.

His Honor *Judge Pearson* refused to give either instruc-

tion as prayed. Upon the first point he charged the jury, "that if the narrative of the accomplice, Robins, from the manner in which it was told, and the matter stated, and from the confirmation it received in many material parts by other testimony, carried to their minds a full and entire conviction of its truth, they might convict the prisoner, although the narrative was not confirmed in any material part, in which Hardin had a personal agency; that it was more satisfactory, when the evidence of an accomplice was supported in the latter particular; but it was not indispensable, provided the jury, from the other particulars, were satisfied the witness was entitled in fact to full credit."

Upon the other point, his Honor charged the jury, "that if they were satisfied from the evidence, that the prisoner, the witness, and Haney, had entered into an agreement to steal or seduce away negroes from their owners, and have them run off to South Carolina or elsewhere, and sold for the benefit of those concerned; and that in pursuance of such agreement, Haney had procured the negro Eli, mentioned in the indictment, to leave his owner, Nancy Davis, and come to him, and afterwards to meet the prisoner Hardin, the witness Robins, and Haney in Webb's old field; and that the slave was there delivered by Haney to Hardin, and received by Hardin with a full knowledge on the part of Hardin, that he was the property of Nancy Davis, and had been stolen or seduced from her; and that Hardin kept the negro for a day, and then procured him to meet Robins and Williams on the road; and that they ran him off to South Carolina, and there sold him in pursuance of the said agreement, (411) and divided the money, as deposed to by the witness, Robins; then the jury were authorized to find the prisoner guilty under the indictment."

The jury found the prisoner guilty; and he moved for a new trial for error alleged in the foregoing instructions; which was refused, and sentence of death passed; from which the prisoner appealed.

The evidence given on the trial was not stated in the exceptions of the prisoner, or in the case made out by the judge. It was stated in the transcript that it was deemed unnecessary to set forth the evidence in detail, as it was much the same as in the case of the *State v. Haney, ante* 390, which

had gone to the Supreme Court from Rutherford upon the same indictment. The attorney-general, however, did not think it proper to insist upon the omission, supposing it to be mere oversight; and consented to amend the record in this case by inserting in it the evidence which appeared, by the record in the other case, to have been given on that trial.

The *Attorney-General,* for the state.

RUFFIN, C. J., after having stated the case as above, proceeded as follows: The first ground of exception in this case has been so recently and fully considered in the *State v. Haney, ante* 390, that nothing remains to be added on it. The evidence of an accomplice is undoubtedly competent, and may be acted on by the jury, as a warrant to convict, although entirely unsupported. It is, however, dangerous to act exclusively on such evidence, and therefore the Court may properly caution the jury and point out the grounds for requiring evidence confirmatory of some substantial part of it. But the Court can do nothing more; and if the jury really yield faith to it, it is not only legal, but obligatory on their consciences to found their verdict upon it. And in *Rex v. Dawlar* the jury were advised that they ought to do so against all the prisoners, when, upon an indictment against several, the evidence of the accomplice was confirmed as to some of them, but not as to all. 3 Stark, 34, and note.

(412) It ought to be premised, before considering the other exception that the Court would have been under much difficulty in getting at it had not the amendment been made in the record. It is not competent to reverse a judgment for an abstract opinion delivered by the judge, however erroneous; and unless the evidence be so stated as to raise the question decided, it is merely abstract. Nor can the Court here go out of one record to another to find the evidence given, or the points made or decided in the former. The record in each case must be complete in itself, without invoking that in any other case. The humanity of the Attorney-General has, indeed, properly removed the objection in this case; and it is hoped that there will be no occasion for him to be thus indulgent to a prisoner again.

Upon this objection of the prisoner, as applied to the evi-

dence, and the instruction given on it, the Court is of opinion that the judgment is erroneous, and that there must be a *venire de novo.*

The prisoner is found guilty generally upon both counts in the indictment; yet it will serve the purpose of distinctness to consider each separately.

The first is for a larceny of a slave; as to which, it has been held to be a felony at the common law, and that the statute only ousts it of clergy. The evidence, we are satisfied, establishes a conspiracy between the accused persons and the witness, to steal or seduce negroes; and that those persons, or any of them, should carry them to a distance from their owners and sell them for the common benefit. But the concerting of such a plan does not make all the parties to it guilty as principals upon a subsequent stealing of a slave by any one of them. There must also be a concurrence and participation in the acts of taking and carrying away. This is ordinarily evinced by those acts being done by the prisoner himself, or by some other, when he is present, or so near that he can assist in the fact, or in the escape of him who actually perpetrates it. Presence, therefore, in its legal sense, generally distinguishes the guilt of a principal from that of an accessory. If the taking and carrying away be completed in the absence of one of the conspirators, his previous assent to or procurement of those acts do not make them his acts; nor (413) does his subsequent adoption of them by receiving the thing stolen, or aiding in concealing or disposing of it, according to the original design, have that effect. The reason is, that the taking and carrying away constitutes the offence, the *corpus delicti;* and in that he had neither actually nor potentially a personal agency. The least removal is an asportation, and completes the crime of him who effects it. 4 Bla. Com. 231. *Lapier's Case,* 1 Leach, 360. It is true, the removal must be such as to amount to exclusive possession in the thief; and therefore, if goods are fastened to a counter by a string, or a purse to the person, or it becomes entangled with keys in the owner's pocket, so that the possession was not actually at any time changed, the taking those things with the view of stealing them is not a larceny, for the want of a severance and asportation. 1 Hale, P. C. 508. *Cherry's Case,* 2 East P. C. 556. But if the possession be once taken by the

thief, although but for an instant, the crime is committed; because thereby the possession and dominion of the owner is, at least for that instant, destroyed. Thus, if one intend to steal plate, and he take it out of a chest and lay it on the floor, but is detected before he gets away, it is a sufficient asportation. Kel. 31. According to these principles, the larceny in this case was committed by Haney alone. When the witness and the prisoner, Hardin, first saw the negro he was in the possession of Haney. According to the testimony of the owner, the negro disappeared on Saturday night; and according to the information given by Haney to Robins he was in the possession, and under the exclusive control of Haney, from that time until Sunday night. There is no evidence to connect the prisoner with the possession at any time before the meeting in Webb's old field. It is true, it does not appear how near that was to Mrs. Davis's. But it cannot be taken upon this record that it was so near as to make *that the* original, or an original taking from the owner; for the instruction supposes that Haney *had* procured the negro to come to *him,* and that *he afterwards* delivered him to Hardin, with a knowledge on the part of Hardin (414) that he *had been* stolen or seduced. The instruction must therefore have been founded on the preconcert; and on the idea that the part which Hardin played was in fulfilment of the previous plan, so as to make the whole one continuing transaction. In support of that view it has been contended, on behalf of the state, that the original plan embraced every thing that was done, including the asportation by Hardin, as a single transaction, and therefore, that it is to be so regarded now. The cases relied on to support these positions are those of *Dyer and Disting,* and *Atwell and O'Donnell,* 2 East, P. C. 557, and 767-8. In those cases goods were removed from one part of a barge and one part of a warehouse to another part, with the view of concealing them, and making it more convenient to remove them entirely, when it could be done with more apparent safety; and persons who did not concur in those acts, but assisted in the final removal from the boat and warehouse, were held to be guilty, as accomplices in the felony, notwithstanding the offence was complete upon the first removal, as to those who made it. No other cases have made the distinction between a receiver and

an accomplice, so nice. But the principle established by them is probably sound. Yet it does not reach the case before us. Those cases proceed distinctly on the ground that while the goods remained in the barge or warehouse they were properly in the place where the owner had deposited them, and were therefore virtually in his custody; and he could not be said by those who assisted in the act of finally carrying them away to have lost his dominion over them, until they were taken from that place of deposit. But that does not apply in a case where a possession is gained by the first removal, clearly in exclusion of that of the owner. In *King's Case,* Easter Term, 1817, Russ. & Ry. Cr. Cas. 332, some persons stole a parcel of butter out of a warehouse and carried it along the street, thirty yards only, and then brought the prisoner to the place and informed him of what they had done, and he assisted in carrying the property to a cart, which was kept in waiting at some distance to convey it away. At first it was thought the prisoner was guilty, upon the ground that he was present, aiding and abetting in the continuation of (415) the larceny, by carrying the goods to the cart; and he was found guilty. But the case being reserved for the opinion of the twelve judges, they held the conviction wrong, because *the taking* was *complete,* before the prisoner had any part in the transaction. In that case it does not appear that there was any previous conspiracy; though from the immediate concurrence of the prisoner, when carried to the spot, one might be readily inferred, if not to steal that particular property, yet to unite in thefts generally, as in the case before us. But in *Kelly's Case,* in 1820, Russ. & Ry. Cro. Cas., 421, that feature was supplied. The prisoner was tried and convicted before Mr. Justice BAYLEY, for stealing two horses. It appeared in evidence that one Whinroe and the prisoner went to steal the horses. But the prisoner stopped when they got within half a mile of the place where the horses were, and Whinroe went on, stole the horses, and brought them to the place where the prisoner was waiting for him, and then they both rode them away together. The learned judge thought Kelly guilty, as well as Whinroe; but upon adverting to *King's Case,* he thought his first opinion wrong, and reserved the case. All the judges held the conviction wrong; being of opinion that the prisoner

was an accessory only, and not a principal, because he was not present *at the original taking.* If going towards the place where a larceny is to be committed, in order, according to a previous agreement, to assist in conveying away the property, and actually assisting accordingly, will not make the person a principal, if he was at such a distance at the time of the taking as not to be able to assist *in it; it* follows *a fortiori,* that merely receiving the stolen goods, twelve hours after they were taken, without any previous knowledge that they had been taken, or even that they in particular were to be taken, can only render the person an accessory to the larceny. It is erroneous to suppose, because in the conspiracy the ultimate disposition of the property, and its being carried towards that end first by the hand of one of the conspirators, and then of another was contemplated, that the whole is one (416) continuing transaction. Those were to be events consequent upon the larceny. They do not enter into the larceny, as parts of the *corpus delicti;* but that crime was complete by the original caption and asportation from the possession of the owner. The common unlawful design to steal does not make each of the parties a principal, unless, as *Judge Foster* says, p. 350, at the commission of the crime "each man operates in his station *at one and the same instant,* towards the same common design;" as where one is to commit the fact, and others to watch at proper distances, to prevent surprise, or to favor escape, or the like.

The foregoing observations enable us in a good degree, we think, to arrive at a proper conclusion upon the second count of the indictment, which is for *seducing and conveying* away the slave. This is a new offence, and depends entirely upon the statute. The Court is not, indeed, free from doubt whether the known circumstances under which the crime of seducing slaves is ordinarily perpetrated, requiring the co-operation of many in taking, concealing, or harboring and transporting them, do not require upon the words "take *or* convey," in the statute, an interpretation that *either* constitutes the offence, within the meaning of the legislature. If that were correct, then the conveying by one, although another had stolen the slave, would itself be a principal felony. This doubt has not been slightly strengthened by the application in the same section of the act, of the same term *"convey,"* to

free negroes; it being made a capital felony, to "take or *convey* a free negro out of this state into another, with intention, etc." But upon deliberate consideration, we have felt ourselves bound, in a case so highly penal, to construe the statute, in reference to slaves, to mean a taking and carrying *from the possession of the owner;* or, in other words, that *convey* is used merely as expressive of asportation in other cases. The indictment before us is framed on that notion; charging that the negro was in the possession of the owner; and that the prisoner "did take and convey him away *from the possession of her, the said &c.*" That we deem the proper sense of the act. The preamble is indicative of it. It recites the pernicious practices of stealing, or otherwise *"car-* (417) *rying away"* slaves, as also of stealing *"and carrying off"* free negroes; which shows that *convey* is substituted, in the body of the act, for *carry away,* and is used in the same sense. Besides, "conveying" implies two termini; the one from which the person is conveyed, and the other to which he is conveyed. With respect to free negroes, the former is necessarily this state, and any part of it; because the subject is alike free everywhere, and the offence is conveying him *out of this state;* and of course the latter terminus is any other state. But with respect to slaves, the asportation need not be out of this state; but may be altogether in it. Unless, therefore, the point at which it is to begin be when the slave was in the owner's possession, the act gives no other terminus. The distinction is the clearer, as the preamble applies the word *away* to slaves, and *off* to free negroes. The point has never been brought directly to the notice of the Court heretofore; but cases have arisen, in which it would have been decisive, and saved much discussion, if it had been deemed tenable. For instance, there could have been no difficulty in *State v. Davis,* 4 N. C., 271, if every conveying a slave with intent to sell, be within the act, and it would have been immaterial whether a runaway slave was the subject of larceny or not. In *State v. Jernagan,* 4 N. C., 483, *Chief Justice Taylor* was of opinoin that the act did not even embrace a person who was present, at the original taking, aiding and abetting in it, because his was not the hand which committed the fact. The other members of the Court did not indeed concur in that part of the opinion; but there was no impression en-

tertained that a subsequent distinct asportation, after the owner's possession was lost, made the person a principal felon, upon the force of those words, "or convey." We think, if such had been the purpose of the legislature, it would have been explicitly expressed, in terms more appropriate, and less equivocal. If others besides those who *seduce* slaves, and convey them from the possession of the owners, or participated in those acts, had been meant, the act would have expressly mentioned procurers and receivers, or used (418) some terms which explicitly embrace them; as has been done in analogous cases. The statute against the forcible abduction of women, 3 Hen VII., c. 2, furnishes an example. After reciting the evil of women being "taken by misdoers, contrary to their will, and married, or defiled," it enacts that "such taking, *procuring,* or abetting the same, and *also receiving wittingly* such women, be felony; and that such misdoers, takers, and procurators to the same, and receiptors, be adjudged principal felons." So the statute of 4 and 5 Phil. & Mary, against alluring away female children from their parents, uses this very word "convey," but in a way which leaves no doubt of its proper signification. It recites the dangerous practices by lewd persons, and others, that for reward buy and sell female children, secretly allured to contract matrimony with unthrifty persons, of taking by sleight or force and conveying away female children from their parents; and enacts, "that it shall not be lawful to any person or persons, to take or convey away, or *cause to be taken or conveyed away,* any maid, &c., out or from the possession, custody, or *government* of the father of," &c. And the language in a very modern British statute upon this subject, that of 9 Geo. IV., c. 31, is equally explicit. Sec. 19 enacts, "that if any person shall, from motives of lucre, take away or *detain* any woman against her will, with intent to marry or defile her; every such offender, and every person counselling, aiding, or abetting *such offender,* shall be guilty of felony." Sec. 21 enacts, "that if any person shall maliciously, either by force or fraud, lead or take away, or decoy or entice away, *or detain* any child under the age of ten years, with intent, &c., or if any person shall, with intent, &c., *receive or harbor* any child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away or detained, as before-mentioned;

every such offender and every person aiding, counselling, or abetting such offender, shall be guilty of felony." Those acts plainly embrace procurers and receivers, or those who do acts, subsequent to the commission of the offence by the original perpetrator, in aid of him, or in further prosecution of his or her a common design. If we could find any such (419) language in the statute, now under consideration, we should not hesitate to enforce it upon the prisoner, for we have no doubt that his acts are within the mischief which the legislature meant to remedy; but we cannot find in the act itself a warrant for holding the prisoner, or Robins, or Williams, to be more than accessories to the *felony* of seduction committed by Haney. The judgment was therefore erroneous, and must be reversed; and a *venire de novo* awarded to the prisoner, Hardin.

DANIEL, Judge, concurred with the Chief Justice.

GASTON, Judge, dissented, and delivered the following opinion.

After a very anxious consideration of this case, and frequent and full conferences with the other members of this Court, I cannot bring my mind to concur in the judgment which has been rendered. In a matter of so much concern to the community, and of such immense consequence to the prisoner, I feel it a duty to state distinctly the point on which I differ from my brethren, and to assign succinctly the reasons on which that dissent is founded.

If the indictment had contained no other charge against the prisoner than that for larceny, I should, with them, have thought the instruction of the judge erroneous. Whether the evidence established an actual taking of the negro by the prisoner's associate, before the meeting at Webb's old field, and showed that his mistress had *then* lost, and Haney had then obtained the *possession,* or proved only that the negro had lent a willing ear to the seductions of the tempter, and was ready to go off, whenever the conspirators should be ready to start on their expedition, was a question of fact for the consideration of the jury; but the instruction authorized a conviction of the prisoner, whatever might be the conclusion of the jury in regard to that fact. Now, when a crime has been actually committed, no subsequent aid rendered to the

felon, though in pursuance of a previous agreement, will make a person a principal in that felony, who was not either actually or constructively present at its commission. The (420) crime of larceny consists in the felonious taking and asportation of the personal goods of another from his possession. The carrying away alone, however criminal the intent, will not constitute larceny, unless it accompany the taking from the possession. Larceny includes the idea of a *trespass;* and therefore, if the party be guilty of no trespass in taking the goods, he can commit no larceny in carrying them away. One not present at the trespass, is therefore, not a principal in the larceny. But it seems to me that the instruction was correct upon the second count of the indictment, and as the prisoner has been found guilty on both counts, and if the instruction were correct, has been properly found guilty on the second, the state was entitled to demand the judgment which was rendered below.

The second count of this indictment charges, that John Haney and the prisoner, a certain negro slave named Eli, the property of Nancy Davis, and in the possession of the said Nancy, did by seduction and violence take and convey away from the possession of the said Nancy, with an intent to sell the said slave, contrary to the provisions of the act of the General Assembly, in such case made and provided. The instruction supposed to be erroneous, was, that if in pursuance of a concerted scheme between Haney and the prisoner to seduce negro slaves from their owners, and convey them to South Carolina for sale, Haney had procured the slave to come to him, and the prisoner received the slave from Haney, conveyed him to South Carolina, and then sold him, the prisoner was guilty of the crime charged. The act is entitled "an act to prevent the stealing of slaves, or by violence, seduction, or any other means, taking or conveying away any slave or slaves, the property of another, and for other purposes." The preamble recites "that it is necessary that the pernicious practice of stealing, or otherwise carrying away slaves, the property of others, as also of stealing and carrying off free negroes and mulattoes, with an intent to sell, should be discouraged by a law with additional penalties." The statute then enacts, that any person who shall steal, or who shall by violence, seduction, or any other means, take or convey away

any slave, the property of another, with intention such slave to sell, dispose of to another, or appropriate (421) to his own use; or who shall by violence or any other means, take or convey any free negro or person of mixed blood out of this state, to another, with an intention to sell or dispose of such free negro or person of mixed blood, shall be adjudged guilty of felony, and suffer death without benefit of clergy.

It is indisputable, I think, that the legislature intended that the severe, but necessary penalty denounced in the statute should apply to others than those who should themselves take and carry away the slaves. They meant by this penalty to prevent the practice not only of stealing, but of *otherwise carrying away* slaves. It has been settled by repeated adjudications, that in pursuance of this intention, they excluded the larceny of slaves, an existing common law felony, from the privilege of clergy; and then proceeded to create a new and capital felony, the taking or conveying away of a slave by violence, seduction, or any other means for the purpose of dishonest gain. Indeed it is not doubted by my brethren, that the acts of the prisoner are within the mischief which the statute was intended to remedy; but they have felt themselves compelled to save him from the penalty denounced against the perpetrators of such mischief, because the words of the statute do not distinctly embrace these acts.

It is manifest that this construction, to all practical purposes, establishes that no new felony was created by the statute. If none can be punished under that act, but he who takes *and* carries away the slave of another from his possession, *causa lucri,* as every such taking and carrying away is larceny, the act fails in discouraging any other means of conveying away slaves, than those which before constituted larceny at the common law.

A penal statute cannot rightfully be extended by construction to embrace cases within its spirit if they do not come within its words; but where the words of such a statute, understood in their usual signification, do embrace a case, and there is no sufficient reason to doubt that the case is also within the meaning of the legislature, the will of the law makers must be executed, although it might have been expressed with greater technical precision. (422)

The act under examination declares guilty of felony every person who shall take *or* convey. Not only then in a popular sense, but according to grammatical strictness, he who conveys is as guilty as he who takes; that is to say, Hardin is as guilty as Haney; "or" may be construed to mean "and," when the context shows that it has been incorrectly used; but it must be supposed to have been correctly used, until the contrary sufficiently appears. In every other instance where "or" is found in this statute, it has received from the Courts its ordinary interpretation. Thus it has been held, that the words "violence, seduction, or any other means," are to be taken disjunctively; so the words with an intention "to sell, dispose of, or appropriate to his own use." It is certain that an indictment is good which charges the use of one of these means, with an intention to accomplish one of these purposes, and the only difficulty on the subject has been, whether an indictment is not liable to the objection of duplicity, which charges the use of more means than one, and an intention to accomplish more than one of the prohibited purposes.

What is there in the statute which requires the substitution of "and" for "or" in this instance? It is not required to effectuate the intention of the law-makers; and I know of no reason besides, which can justify it, unless such substitution be necessary to save the enactment from absurdity.

I do not see any such absurdity. The word convey is very nearly synonymous with carry, and may be regarded as differing from it principally as indicating more distinctly a motion from one place to another place, or transmission from one person to another person. The legislature has not fixed either terminus of the criminal conveyance, either that at which it begins, or that at which it is to end. They have made every removal of a man's slave, with the wicked purpose of depriving the owner of his property, a felony. In their view of the enormity of the criminal practises prevailing, and of the necessity of putting them down by rigorous pun-
(423) ishments, it was right so to enact. The practice was equally mischievous, whether the conveyance was made by a trespasser or by a bailee; by the original seducer, or by his accomplice; whether to another state, or to another part of the same state; wether to a greater or smaller dis-

tance; where, they have affixed no termini, I think the Court ought not to make any.

In the preamble of the act, the term "carrying away," is used in regard to slaves, and the term "carrying off," with respect to free persons, while the term "convey" is used in the enactments. But little light, it seems to me, is thereby thrown on the meaning of the term "convey." It is natural to expect more precision of language in the enacting clauses of a statute, than in its preamble. The term convey is, according to my view of it, the most appropriate to express the meaning of those phrases as used in the preamble. The practice there first spoken of, is not simply that of carrying away slaves, but of stealing or *"otherwise* carrying away." I am at a loss to discover any other mode than stealing referred to, if the conveying by one who has not taken, be not meant. The other practice mentioned in the preamble is that of stealing and carrying *off* free persons. By stealing, as applied to free persons, must be intended taking, for as they are not the goods of another, they cannot be *stolen.* Carrying *off,* was thought more applicable than carrying away, when the removal contemplated was out of the state. In the body of the act accordingly, when its enactments with respect to free persons are declared, we find the words *"take or convey* out of this state to another." The term "convey," as here used, is admitted to apply to those who have not taken, and the disjunctive, or, between take and convey, is to be here understood in its proper sense. It is not obvious, I think, why the very same phrase, "take or convey," in the same sentence, should be differently interpreted.

If the construction of the act which I adopt be correct, it was sufficient for the conviction of the prisoner, that he had acted in the carrying away, though not in the taking of the slave. The crime planned by the conspirators—the crime committed—the crime denounced by the law— (424) was the removal of the slave from the owner for sale. Every one who actually performed a part in the commission of that crime, whether by getting possession of the slave, or by conveying him after the possession was taken, is, as I believe, guilty as a principal felon, within the words and meaning of the act; not on the ground of a constructive pres-

ence when the acts of his associates were performed, but because of the acts performed by himself.

PER CURIAM. Judgment reversed.

Cited: *State v. Williams,* 31 N. C., 150; *State v. Martin,* 34 N. C., 168; *State v. Holland,* 83 N. C., 624; *State v. Hardee, Id.,* 622; *Buxley v. Buxton,* 92 N. C., 484; *Ferrall v. Broadway,* 95 N. C., 557, 559; *State v. Miller,* 97 N. C., 487; *State v. Rowe,* 98 N. C., 637.

STATE v. EZEKIEL MATHEWS.

One who entertains strangers only occasionally, although he receives compensation for it, is not an inn-keeper; and if on such occasions, gambling, drinking and fighting take place, he is not indictable as the keeper of a disorderly house.

The defendant was indicted for, that he "unlawfully did keep and maintain a certain common ill-governed and disorderly house; and in the said house certain persons of evil name and fame, and of dishonest and immoral conversation, then, &c., and on other days and times, then and there, unlawfully and willingly did cause and procure to frequent and come together, and the said persons in the said house of him, the said E. M., at unlawful times, as well as in the night as in the day, then, &c., to be and remain drinking, tipling, gaming and misbehaving themselves, unlawfully and wilfully did permit, and yet doth permit, to the great damage, and common nuisance, &c."

The plea of not guilty was entered; and on the trial, before *Dick, Judge,* at Randolph, on the last Circuit, the case was, that the defendant lived in the country, at a distance from a public road, and about half a mile from any other house; that he was not a tavern-keeper, but that upon two occasions during the year before the trial, there had been races in his neighborhood; that for three nights during
(425) one of the races, and two during the other, a number of persons had gone to his house; that all could not be accommodated with beds; and that those who could not be

thus accommodated, sat up all night, many of them playing cards and drinking spiritous liquor; and that several assaults and batteries occurred; and that the defendant furnished the company with spiritous liquor and food, and charged them for it.

His Honor charged the jury that the defendant, by furnishing food and liquor to the company, and taking compensation for it, made himself the keeper of a public house *pro tempore;* that if there were persons present who did not gamble, drink and fight, the law presumed that the gambling, drinking and fighting was an annoyance to them; and that if these disorders took place with the connivance of the defendant, he was guilty. The defendant was convicted, and appealed.

No counsel appeared for the defendant in this Court.
The *Attorney-General,* for the state.

DANIEL, Judge. Nuisance, *nocumentum,* or annoyance, signifies any thing that worketh hurt, inconvenience or damage. 3 Bla. Com. 215. Common nuisances are such inconvenient and troublesome offences as annoy the whole community. They consist in either, the doing of a thing to the annoyance of *all* the citizens, or the neglecting to do a thing which the common good requires. 4 Bla. Com. 170. The opinion of the Judge, that the defendant was *pro tempore* a keeper of a public house, inasmuch as he received pay for his entertainment of those persons that were at his house, is not in our opinion, correct If he had been able to have entertained more persons, and any more had called on him, he would have had the power to refuse them entertainment. Whereas a keeper of a public inn could not have refused, without the peril of a suit and an indictment. All and every one of the citizens, have a right to demand entertainment of a public inn-keeper, if they behave themselves, and are willing and able to pay for their *fare.* And as *all* have a right to go there and be entertained, they are not to be annoyed there by disorder; and if the inn-keeper permits it, (426) he is subject to be indicted as for a nuisance.

The defendant, therefore, was not in law the keeper of a public house for any time. Nor does the indictment charge

him as the keeper of an inn or public house. Those who visited his house on the occasion stated by the witnesses, came not in pursuance of any right on their parts, but of his presumed or express invitation. The law will not imply that they were annoyed by the entertainment they received, and the evidence not only did not show that others were annoyed, but repelled the inference that they might have been annoyed. The judge also charged the jury, "that if gambling and disorder were carried on with the knowledge and countenance of the defendant, he was guilty." The keeping of a common gaming house is indictable at common law. A common gaming house is a public nuisance, because of the necessary injury to the morals of the community resulting from such an *establishment.*

But the defendant was not charged, and if charged, could the evidence have made out the charge of being the keeper of a common gaming house? He is indicted as the keeper of a common ill-governed, disorderly house. The mere fact that gaming did sometimes occur in his house does not make it *in law an* ill-governed and disorderly house. Gaming in private houses is not prohibited by law. The act of 1801 makes it a misdemeanor to game in a house of public entertainment or a tavern, but not in a private house. We think the judge erred in his charge; *first,* in supposing the facts proved constituted the defendant a keeper of a public house *pro tempore. Secondly,* in telling the jury that gambling there, with the knowledge and connivance of the defendant, made him guilty as charged in the indictment. The defendant's conduct, it must be admitted, was reprehensible in a moral point of view, but every breach of morals is not indictable. We are of opinion that there must be a new trial.

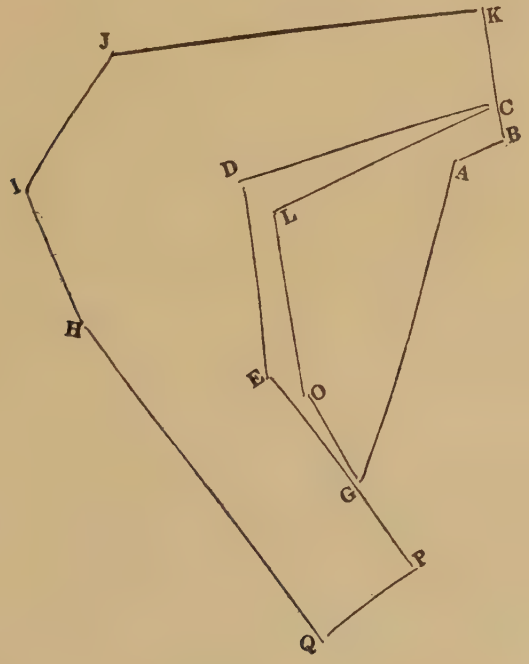
PER CURIAM. Judgment reversed.

Cited: State v. Boyce, 32 N. C., 540; *State v. Wright,* 51 N. C., 27; *State v. Steele,* 106 N. C., 776.

Den ex dem DAVID G. FLANNIGAN v. DAVID M. LEE.

A grant calling for a corner of an adjoining grant, and three of its lines, is, in the absence of proof that it was actually run differently, to be confined to them; and the fact that the grantee, after its date, executed a deed for the adjoining tract, which did not refer to either of the grants, and called for the same corner, and one of the three above mentioned lines of his grant, and corresponded nearly with the other two, is not sufficient to control the calls of his grant.

Ejectment, tried at Mecklenburg, on the last Circuit, before *Saunders, Judge*. The land in dispute is represented on the diagram by the triangular piece between the lines C D and C L.



The lessor of the plaintiff undertook to make out title in himself, by showing first a grant, dated in 1795, to David Flannigan, his ancestor; which grant, after setting forth sev-

eral lines not material to be stated, called for a gum, John Osborne's corner, which both parties admitted to be at C; running thence with three of his lines north sixty-four
(428) degrees east one hundred and fourteen poles, to a pine, at D; thence north eighty-eight poles, to a hickory at E; thence north thirty-four degrees west forty-three poles, to a stake in said Osborne's line at G; thence to the beginning. He next gave in evidence a sheriff's deed to himself, executed in 1813, calling for precisely the same boundaries, as those set forth in the grant, and proved a continued possession for twenty years in himself and his ancestor.

The defendant, to show title in those under whom he claimed, gave in evidence a grant dated in 1773, to Noble and John Osborne, for a tract of land lying south and east of Flannigan's land, which called for the several boundaries above mentioned, until it came to E; from thence, instead of north thirty-four degrees west forty-three poles, it called for the same course seventy-four poles, to a black oak at P; thence by several other courses, Q, &c., to the beginning. He next exhibited a deed executed in 1795, to Noble and John Osborne, by Adlai Osborne, agent of the trustees of the university, corresponding generally in its boundaries, with those of the grant to them, but after reaching the gum at C, instead of calling for a course north sixty-four degrees west, one hundred and fourteen poles, to a pine, it called for north sixty-one degrees east one hundred and fourteen poles, to a stake at L; thence north three degrees west, eighty-eight poles to a hickory at O; thence by the same line as in the grant, to the beginning. He also gave in evidence a deed executed in 1804, from David Flannigan, the father of the lessor of the plaintiff, and three other persons, calling themselves the heirs of Noble Osborne, deceased, to John, James, Noble, and Jane Osborne, "heirs of John Osborne, deceased," for the land described in the deed of Adlai Osborne. Neither of these deeds contained any recital or averment, that the land thereby conveyed was the same which had been granted to Noble and John Osborne; nor did they make any reference to their grant, or to that of Flannigan; and the latter deed passed estates only for the respective lives of the bargainees.

One of those bargainees had died many years before
(429) the day of the demise in the plaintiff's declaration.

The evidence of title on both sides having been given, the plaintiff offered testimony to show that the line C D was the true line of the grant to David Flannigan, running from the gum, John Osborne's corner, with his line north sixty-four degrees east, one hundred and fourteen poles, to a pine; but the defendant objected, that no evidence for that purpose could be received, because it would contradict David Flannigan's deed, which made the line C L, running from the gum north sixty-one degrees east, one hundred and fourteen poles, to a stake, to be the line of Osborne's land. His Honor being of this opinion, the plaintiff was not permitted to offer his evidence to establish the line C D, as the line of the grant to the ancestor of his lessor, and submitted to a nonsuit; and appealed.

D. F. Caldwell, for the plaintiff.
A. M. Burton, and *Devereaux,* for the defendant.

GASTON, Judge, after stating the case, as above, proceeded: In support of this decision it has been insisted here, that the true line of John Osborne from the gum, wherever it can be ascertained, is the boundary of Flannigan's grant, and cannot be departed from: that although Osborne's line, previously to 1795, might have run from C to D, yet that upon the execution of Adlai Osborne's deed, which preceded the grant to Flannigan by two years, it was extended out to C L; and that in legal intendment, the call in Flannigan's grant for Osborne's line, is for Osborne's line then existing; and not for a line of Osborne's which had formerly existed, but was not then in being.

We do not assent to this reasoning. In the first place, it is to be borne in mind, that when Flannigan's grant calls for Osborne's lines, it does not call for them simply by that name, but it adds other descriptions to identify them; "running with three of his lines north sixty-four degrees east, one hundred and fourteen poles, to a pine; north eighty-eight poles to a hickory, and north thirty-four degrees west, forty-three poles, to a stake in Osborne's line." Of the boundary in question, there are then three descriptions—it is Os- (430) borne's line—it runs north sixty-four degrees east one hundred and fourteen poles—and it runs from a gum to a

pine. When all the descriptions of a boundary in a deed or grant can be made to agree, they must all be observed. When they disagree, and some must be rejected, then that description, or those descriptions should be preferred, which the law regards as comparatively more certain. In this scale of legal certainty, the first rank is assigned to those permanent and striking monuments of the *natural* objects called for in the instrument, in regard to the existence and locality of which a mistake is almost impossible; and the next rank is given to the less permanent and notorious, but still permanent and notorious monuments then erected, or then marked to show forth the boundaries intended by the parties. Had it been ever so clearly established that at the date of Flannigan's grant, the line C L was *notoriously* Osborne's line, and that there was no other which had ever borne that name, it was still competent for the plaintiff to show the originally marked corner pine yet standing at D; or to prove that it had stood at that point; or to prove a line of marked trees, either existing, or shown to have existed at date of Flannigan's grant, extending from C to D; and in either case, it would have been the duty of the Court to instruct the jury that such monuments, if established to their satisfaction, to have been made as and for Flannigan's corner, or Flannigan's line from the gum to the pine, were to be respected, rather than Osborne's line, as affording more certainty in regard to the extent of the land intended to pass by the grant. With respect to the conflict between the call for another's line, and the course and distance by which it is described, there is not the same decided legal preference. Where this line is shown to have been well established and notoriously known, it is reasonably regarded as yielding greater certainty than the other description; but where it is not a well-known marked line, and especially if an observance of it shows so gross a mistake in the course and distance as shocks probability, it is more safe to adhere to the latter and reject the former.

But the call for another's line, is not necessarily a call for his *true* line. It means the line bearing that appella-
(431) tion, and reputed to be such. Of course, in the absence of all proof tending to show a difference between the true and the reputed lines, they will be presumed to be the same; but they may be shown to be different. Thus, if there

have been two lines bearing the same name, the reference will be understood to apply to the one or the other, accordingly as extrinsic evidence, or the other descriptions in the deed, shall show the one or the other to have been intended. If, for instance, in the present case, from 1773 to 1795, the line C D was John Osborne's line, and in 1795, in consequence of the deed from Adlia Osborne, this line was extended *out* to C L, it is open for inquiry by extrinsic evidence, whether in 1797, the former had lost its appellation altogether, and the latter had become known in the neighbourhood as Osborne's line. If such were the fact, and there were no additional descriptions in Flannigan's grant, to designate the line, then the new line, as being the one bearing exclusively that name, must be deemed the line contemplated by the parties to the grant. But if the old line had not lost its name, and the new had not acquired it, clearly, on the same principle, the old must be understood as the line called for. In the present case, however, the Court was bound to hold that the reference in Flannigan's grant, was to Osborne's line, under the grant of 1773, and not to his line under the deed of 1795, because of the additional descriptions and references in Flannigan's grant. The calls from the gum are to go with *three* of Osborne's lines, and the courses and distances of two of these, and the course of the third, are set forth, north sixty-four degrees, east one hundred and fourteen poles, to a pine; north, eighty-seven poles, to a hickory; and north, thirty-four degrees west, forty-three poles, to a stake in his line. If the lines of Osborne's grant be meant, there is a perfect correspondence between all the lines *described*, and all those *referred* to. If those of Osborne's deed be meant, the entire description in the first line, and the course of the second, must be rejected as erroneous and deceptive; (432) and they must run, not north sixty-four degrees east, to a pine, but north sixty-one degrees east, to a stake; and not north, but north three degrees west, to a hickory. Such a construction ought to be put on the grant, if it may be, as will give to every part of it a sensible effect.

Something has been said about an estoppel, but the argument, whether well or ill pursued, is founded on a mistake. There is no averment in David Flannigan's deed, that the land thereby conveyed, is the land which had been granted

to Noble and John Osborne. There is no recital that the line from the gum north, sixty-one degrees east, to a stake, is the line of his grant. The question of boundary, therefore, was perfectly open to both sides—to evidence on behalf of the plaintiff, that C D was the line of Flannigan's grant; and to evidence on behalf of the defendant that C L was the line. If C L be established as the line, the plaintiff must fail altogether. If C D be established, yet as the ancestor of the plaintiff's lessor in 1804, conveyed up to the line C L, *his* interest, so far as the deed purported to convey it, passed thereby. This deed operated, not by estoppel, but to pass an estate. By this deed, however, the bargainees acquired estates but for the term of their respective lives; and if C D be the true line, then the reversionary interest in the piece in controversy remained in David Flannigan. Upon the death of one of these bargainees, the right to immediate possession accrued to the reversioner or his heir, or assignee. And it is not to be questioned at this day, but that on a demise for an entire tract, the plaintiff may show title to an undivided part thereof. In this way, the lessor of the plaintiff might have entitled himself to a judgment for an undivided part. Perhaps he might have established a right for the whole. The sheriff's deed was colour of title to *all* the land embraced within it, and accompanied by a proper possession of sufficient duration, it would ripen into a valid and indefeasible title.

This Court is of opinion, that the evidence proposed to be given was admissible. The judgment below is therefore to be reversed, with costs, and a new trial ordered.

PER CURIAM. Judgment reversed.

(433)

Den ex dem. MARY MILLS v. SPIER WITHERINGTON.

A final judgment in a petition for the partition of real estate, under the act of 1789, (*Rev. c. 309,*) is conclusive upon all the parties to it; and each party is estopped to dispute the title of any other to the lot assigned to that other in severalty.

This was an action of ejectment tried at Pitt, on the last Circuit, before *Bailey, J.* The action was brought to recover a tract of land, which had been before assigned in severalty to the defendant by the final judgment of the County Court of Pitt, in a petition for partition of real estate. The petition was filed by the present defendant and others against the lessor of the plaintiff, stating that they were tenants in common of the lands described in the same, and praying a partition thereof; and an interlocutory order was made, appointing commissioners, who returned a report, upon which a final judgment was rendered. The lessor of the plaintiff afterwards, and notwithstanding the judgment in the petition for partition, obtained a grant from the state for the land which had been assigned to the defendant in severalty, alleging that the same was vacant; and on the trial, she rested her title to a recovery solely on the said grant. The defendant claimed under one Frederick Mills, Junior, who held an undivided share in the lands by virtue of a deed of gift from his father Frederick Mills, Senior, and contended that the lessor of the plaintiff was, by force of the final judgment in the petition for partition, estopped to dispute his title to the land in dispute. His Honor charged the jury, that if the land in dispute was embraced in the deed of gift, under which the defendant claimed, the plaintiff's lessor was estopped. But if the land was not embraced in the said deed, but was vacant at the time when the lessor of the plaintiff obtained a grant for it, she was then not (434) estopped by the judgment in the petition for partition. The jury returned a verdict for the lessor of the plaintiff; and the defendant appealed.

No counsel appeared for the defendant in this Court.
The *Attorney-General,* for the lessor of the plaintiff.

DANIEL, Judge, after stating the case as above, proceeded as follows:

We think the judge erred in confining the jury to the question, whether or not the lands in controversy were embraced in the deed of gift from F. Mills, senior, to F. Mills, junior. If the land sought to be recovered by the plaintiff, was embraced in the report of the commissioners, which report had been confirmed, and final judgment rendered thereon, then, we think the lessor of the plaintiff, who had been a party to that judgment, was concluded, bound, and estopped to controvert any thing contained in it. The legislature, by the act of 1789, (*Rev. c.* 309) gave to tenants in common of real estate the *petition* for partition, in the place of the ancient *writ* of partition. The final judgment at common law in a writ of partition, runs thus, *ideo consideratum est quod partitio praedicta firma et stabilis in perpetuum teneatur.* Thomas's Coke, 700. And it was conclusive on the parties, and all claiming under them. (*Ibed.,* note 55). In *Clapp v. Bronagham,* 9 Cowan, 569, the Court say that the judgment in partition, it is true, does not change the possession, but it establishes the title, and, in an ejectment, must be conclusive. The judgment of the Court, adjudging a share to belong to one of the parties, and allotting it to him to hold in severalty, must be sufficient to authorize him to recover it as to all the parties to the record; the judgment is, as to them, an estoppel. The act of 1789 gives the same force to a final judgment in a petition for partition of real estate. It declares, that the division when made, shall be good and effectual in law to bind the parties, their heirs and assigns.

PER CURIAM. Judgment reversed.

Cited: Latta v. Morrison, 23 N. C., 151; *Long v. Orrell,* 35 N. C., 127; *Stewart v. Mizell,* 43 N. C., 244; *Turpin v. Kelly,* 85 N. C., 401; *Grantham v. Kennedy,* 91 N. C., 155; *Carter v. White,* 131 N. C., 17; *Carter v. White,* 134 N. C., 474.

(435)

STATE v. CHARLES OXENDINE.

1. The act of 1831, c. 13, authorizing the hiring out of a free negro or free person of colour, convicted of an offence against the criminal laws of the state, for the payment of the fine imposed, where he is unable to pay the same, does not extend to one who submits to the Court.

2. Whether the act of 1831, c. 13, is repugnant to any of the provisions of the Constitution, and therefore void? *Qu.*

The defendant was indicted in the Superior Court of Robeson county, for an assault and battery, and on being served with process, appeared and *submitted* to the Court; his Honor *Judge Settle* presiding. Thereupon the record states, that he was fined fifteen dollars, the amount of the costs of prosecution; and it appearing to the satisfaction of the Court, that the defendant was a free negro and unable to pay the fine imposed, it was considered and adjudged by the Court, that the sheriff of the county of Robeson, hire out the defendant to any person who will pay the fine for his services for the shortest space of time; and that the sheriff proceed according to the directions of the act of assembly, passed in the year 1831, c. 13. From this judgment the defendant appealed to the Supreme Court, upon the ground that the act of assembly of 1831, authorizing the hiring out of free persons of colour, to pay the fines imposed upon them, was unconstitutional and void.

Strange and *Badger,* for the defendant.
The *Attorney-General,* for the state.

GASTON, Judge, after stating the case as above, proceeded: The constitutional question supposed to be involved in this case, has been elaborately and ably argued, both for the defendant and the state, and has been most deliberately considered by the Court. It seems to us, however, upon an inspection of the record, that a decision of this question is not necessary for our adjudication in the case before us, and that it would be indecent and improper, to pronounce any opinion upon so weighty a question as the constitutionality of an act

of the legislature, unless in a case where its determi-
(436) nation was absolutely required.

The enactments of the act of 1831, apply only to cases "where a free negro or free person of colour shall be *convicted* of an offence against the criminal laws of the state, and sentenced to pay a fine, and it shall appear to the satisfaction of the Court, that the free negro, or free person of colour so *convicted,* is unable to pay the fine imposed." In these cases, and in these only, the act enjoins, that the fine shall be at least equal to the amount of the costs of prosecution, and that if he be unable to pay the fine imposed, the Court shall direct the sheriff of the county, to hire the free negro or free person of colour "so convicted," to any person who will pay the fine for his services for the shortest space of time.

Waiving, for the present, the inquiry, whether this act be repugnant to any of the provisions of our Constitution, for securing the personal liberty of freemen, against imprisonment for debt, after ascertained insolvency, or against excessive fines, unusual punishments, or other forbidden restraints; and also whether its provisions be compatible with the power to grant pardons and reprieves, which that Constitution expressly grants to the governor of the state; all of which questions have been raised here, and are well worthy in a fit case, of patient and mature consideration; and assuming it to be wholly clear from constitutional objections, it is certainly an act highly penal in its character, since it compels the assessment of a fine, at least equal in amount to the costs of prosecution, upon one unable to pay it, and for any offence, however trivial in kind, or mitigated in degree; and because it provides for the collection of this fine by a rigorous procedure, not authorized against any other freeman, for any crime however atrocious. On no principle of judicial construction, therefore, can we extend its application beyond its distinct enactments.

These are explicitly confined to cases of *conviction* of criminal offences. Conviction, properly so called, could only take place according to the common law, either upon confession, or verdict, or where the trial was by battle, upon
(437) recreancy. Co. Lit. 390, b. By confession is meant express confession; where a person charged directly

confesses the crime with which he is charged. Blackstone accordingly states, "Conviction may accrue two ways; either by his confessing the offence and pleading guilty, or by his being found so by the verdict of his country." 4 Bla. Com., 362. This direct confession is the highest conviction which can be, and carries with it so strong a presumption of guilt, that an entry on record, *quod cognovit indictamentum,* &c., in an indictment of trespass, estops the defendant to plead not guilty, to an action brought afterwards against him for the same matter. 2 Haw., 466, (B. 2, ch. 31, sec. 1 and 2.) But this is not the effect of an implied confession; as where a defendant, in a case not capital, doth not directly own himself guilty, but *in a manner* admits it, by yielding to the king's mercy, and desiring to submit to a small fine, in which case, if the Court think fit to accept of such submission, and make an entry that the defendant, *posuit se in gratiam regis,* without putting him to direct confession or plea (which in such cases seems to be left to discretion) the defendant shall not be estopped to plead not guilty to an action for the same fact, as he shall be where the entry is *quod cognovit indictamentum.* Haw. *ut supra,* sec. 3. It is also laid down, that where a statute imposes a fine certain, upon *any conviction,* the Court cannot mitigate it; but if the party come in before the conviction and submits himself to the Court, they may assess a less fine, for he is *not convicted,* and perhaps never might be. 3 Salk, title Amerciaments and Fines, 38. So upon such a submission on an indictment for an assault, a man may produce affidavits to prove *son assault* upon the prosecutor, in mitigation of the fine, otherwise where the defendant is *found guilty;* for the entry upon the confession (that is to say, an implied confession by submission) is only *non vult contendere cum domino rege,* and *ponit se in gratiam curiae. Queen v. Templeman,* 1 Salk., 55.

We are of opinion that the Court below erred in rendering a judgment against the defendant, under the act of 1831; because the defendant not having been *convicted* of an offence, his case was not embraced within that act. (438) The sentence rendered, therefore, must be reversed, and the Superior Court of Robeson be directed to render judgment upon the submission of the defendant as at common

law; exercising its discretion according to the nature of the offence, and the circumstances of the defendant.

PER CURIAM. Judgment reversed.

Cited: State v. Manuel, 20 N. C., 147.

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(439)

Den ex dem. SAMUEL W. FEREBEE v. SAMUEL PROCTER.

1. In a will, the words, "I leave all my land not given away, to be sold, and after my debts are paid, the residue of my estate to be divided between my wife, son and daughter;" together with the following in a codicil, "I nominate M. S. my executor to this my last will, to make sale of my land before mentioned, and to execute this instrument of writing in every respect," do not vest an estate in the executor, but only confer on him a power of sale. Neither are they a devise of the land to the wife and children.

2. Land directed by a testator to be sold, but not devised for that purpose, until a sale, descends to the heir. And, if converted out and out, the rule at law is the same; the doctrine of conversion being confined to the Court of Equity.

3. An administrator with the will annexed, cannot, by virtue of his appointment, execute a power of sale given to the executor.

4. Neither will a decree of a Court of Equity directing him to sell and convey, enable him to vest a legal estate in his vendee. That Court has jurisdiction only to direct those having the legal estate, to join in a sale for the purpose of executing the trusts of the will, but has none to declare the legal title to be in any person, excepting the one in whom at law it vests.

Thomas Pool Williams, being seized of the premises in the declaration mentioned, made his will 24 Oct., 1799, and therein devised two tracts of lands particularly described, to his son Samuel. The will then contains these clauses:

"It is my will and desire, that my executor hereinafter mentioned, pay all my just debts. Thirdly, I leave all my negroes to be equally divided between my wife, Elizabeth, my daughter, Peggy, and my son, Samuel. Fourthly, I leave all my lands not given away, to be sold at six and twelve months credit; and after my debts are paid, the residue of my estate to be divided between my wife, daughter, and son before mentioned."

In this instrument no executor was named; but on the

same day, the testator added on the same sheet of paper: "I nominate Malichi Sawyer my executor to this my last will, to make sale of my lands before mentioned, and to execute this instrument of writing in every respect;" and executed the same as an addition to his will.

The testator died in January, 1800; and this will was thereupon proved. Malichi Sawyer refused to intermeddle with the estate, and renounced the office of (440) executor; and administration with the will annexed, was then duly committed to Thomas C. Ferebee.

The testator left but two children, Peggy and Samuel, who were his heirs at law, and both infants; and Peggy had then intermarried with the said Ferebee.

In April, 1804, Thomas C. Ferebee filed his bill in the Court of Equity for the District of Edenton, against the said Samuel and Elizabeth, the son and widow of the testator, in which he stated the foregoing facts, and charged that the testator had died largely indebted, so that it had become necessary, for the satisfaction of his creditors, either to sell the slaves left to his family, or the lands mentioned in the residuary clause of the will; and that it was most beneficial to the family, as well as consonant with the intention of the testator, that the debts should be paid out of the proceeds of those lands; and that a sale could not be made by the parties without the aid of that Court, by reason of the infancy of his wife, the said Peggy, and of her said brother. The bill then prayed process against Elizabeth and Samuel, and a decree for the sale of the lands. An answer was put in by the widow, and for the infant Samuel by his guardian appointed by the Court; in which the allegations of the bill are admitted, and the defendants join in the prayer of the sale. Upon those pleadings, the Court, on the 19th of April, 1804, decreed, "that the complainant do sell to the highest bidder at public auction, &c., the lands, &c.," (including the premises in dispute in this action) "and that the proceeds of such sales be assets in the hands of the said Thomas C. Ferebee to satisfy the creditors of the testator, Thomas P. Williams."

Soon afterwards, Thomas C. Ferebee sold the premises now sued for, upon the terms prescribed in the decree, and made a deed therefor; under which the defendant was in possession at the date of the declaration.

After the sale and conveyance, the widow, Elizabeth, died intestate in 1806, leaving the said Peggy and Samuel,
(441) her only children and heirs-at-law; and then the said Peggy died, also in 1806, leaving her said husband surviving, and also the lessor of the plaintiff, their only child, and her heir-at-law. Thomas C. Ferebee died in the beginning of the year 1836; and this action was brought in November following.

Upon these facts stated as a case agreed, the cause was submitted to his Honor *Judge Toomer* at Camden on the last Circuit, who gave his judgment as follows: "On a recurrence to the will, it appears, that the testator did not intend to die intestate as to any portion of his estate, and the will seems to be sufficient to prevent intestacy as to any part of it. The testator left the land, described in the declaration, to be sold;—ordered his executor to make the sale, and, after payment of his debts, directed the residue of his estate, including the proceeds of the sale, to be divided between his wife, daughter and son. Hence it appears, the mother of the lessor of the plaintiff could not claim the premises described in the declaration, as heir-at-law of the testator. The claim must be under the will.

"But it may be concluded, that one undivided third part of the premises was devised to the mother of the lessor, and has descended on him, as heir-at-law. To the Court it seemeth that the land described in the declaration, was converted into personalty by the will of the testator. He ordered the sale, and intended that the proceeds should have the quality of personal estate; first, for the purpose of paying his debts, and then, for division between his three legatees. Such intent is indicated by the circumstance, that the proceeds of the sale were to form a part of the residue of his estate, which, after payment of his debts, was to be distributed, according to the rules governing the succession to personal property in cases of intestacy. The sale was ordered by the testator to be absolutely made; no discretion was to be exercised by the executor on the subject. If the portion of the proceeds of the sale, to which the mother of the lessor was entitled, be considered as personal estate, that portion was received by her husband during the coverture, and thus became his property. If the

will of the testator converted the premises, described in the declaration, into personal estate, and the lessor (442) have any claim thereto, it cannot be asserted in this action.

"The premises described in the declaration, were not devised to the executor; a mere power of sale was given to him by the will. If the premises be considered, notwithstanding the will, as real estate, the power to sell could not be executed by the administrator with the will annexed, either at common law or under the statute of 21st Henry 8th. But, if the will converted the premises out and out into personalty, could not the administrator, with the will annexed, make the sale *virtute officii,* without the aid of any decree?

"When the executor renounced the execution of the will, and refused the acceptance of the trust, the Court of Equity could appoint a trustee to prevent a failure of the trust created by the will, and thus execute the intent of the testator.

"Upon the refusal of the executor to accept the trust, it was not necessary to make him a party to the bill when the sale was ordered by the Court of Equity. And if the construction given to the will be correct, the decree was not void, because the mother of the lessor was not directly a party to the bill, as her husband was the administrator with the will annexed, filed the bill, prayed the sale, obtained the decree, and made the sale pursuant to that decree. The decree was made by a Court of competent jurisdiction, and the sale was made pursuant thereto. Under the circumstances of the case, I cannot think the decree and sale void as to the interest of the mother of the lessor, because she was not directly a party to the proceeding.

"The testator died in 1800; the mother of the lessor, in 1806; the sale was made in 1804; this action was brought in 1836, and the defendant is stated to be in possession of the premises, claiming the whole under the sale made as aforesaid. The deed made by the husband, pursuant to the sale, and under the decree of the Court, was at least colour of title. If the defendant had actual adverse possession for seven years after the lessor attained full age, and his mother had not been actually seized of the premises so as to entitle the husband to be tenant by the courtesy, then the title (443) of the defendant would be good, and the claim of the

lessor barred. But the fact of actual adverse possession for seven years by the defendant, is not distinctly set forth in the case, nor is the actual seizin of the mother, so as to make the husband tenant by the courtesy."

His Honor being thus of opinion that the lessor of the plaintiff had no title, ordered a nonsuit; and he appealed.

Devereux, for the lessor of the plaintiff.
Kinney, for the defendant.

RUFFIN, Chief Justice, after stating the facts as above proceeded as follows: The premises descended to the testator's two children, unless they are devised in the will to Sawyer, the executor, or to the wife and children. We think with his Honor, that no estate is given to the executor, but only a power to sell, coupled with a trust for the payment of the debts and legacies. The words are, "I leave my lands, not given away, to be sold." It is not said to whom they are left; nor in that part of the will, by whom they are to be sold. Lord *Coke* says, that "when a man deviseth his tenements to be sold by his executors, it is all one as if he had devised them to his executors to be sold; and the reason is, because he *deviseth the tenements,* whereby he breaks the descent." Co. Litt., 236. This, however, has been questioned by high authortiy. In Lord *Nottingham's* note on this passage, its correctness is denied, and it is said that no interest passes to the executor. Sir *Edward Sugden,* thinks that *a devise of land to be sold by executors,* without other words giving them the estate, invests them only with a power, not an interest. Sug. Pow., 102—108. It is not necessary, in this case, that the Court should adopt the one or the other of those opposite opinions. The existence of such a difference of opinion, renders the text at least doubtful. If it be correct, it must be so upon the ground of favouring the intention, where there were several executors, by preserving for the largest period, the authority in some person to sell; which induced the Courts to lay hold of the expression "devise the land (444) to be sold by my executors," which probably meant nothing more than "direct the land to be sold by them," as a devise of the land *to* the executors. This, perhaps, the particular term *devise* authorized, as its technical

sense is a *gift* of land by will. But there is not equal reason for receiving in that sense the word "leave" which is here used; and especially as it is here used. It may mean as well "I direct or order," my land to be sold, as that "I give" it to be sold. We think the former was the testator's meaning. In the first place, the will is silent in this clause, as to the person to whom the land is devised, if "leave" means "devise." It is true, we afterwards see that an executor is appointed, and that he is expressly directed in the clause of appointment to make sale of the land. But it does not follow that, the first provision was meant to be a devise of the land to him. If, indeed, a testator directs his land to be sold for the payment of his debts, or for any other purpose which would naturally bring the proceeds into the hands of the executor for distribution, the power to make the sale is in the executor by implication, although he be not named in the will, as the person to make it. Sug. Pow., 160. *Davoux v. Fanning,* 2 Johns, Chan. Ca., 252. That arises from necessity, to prevent a clear provision of the will from becoming ineffectual. The power to sell is unquestionably declared, and was intended to be executed by some person; and the sole inquiry is, by whom? The answer is obvious; by the person who is to administer the fund when raised. But the purposes of the will do not at all require an estate in the executor; and therefore, unless he be mentioned as the person to whom the gift is made, no estate to him ought to be implied. The rule on the contrary, is to favour the heir, and to require plain words, or a necessary intendment, to disinherit him. Here a power answers every end the testator had in view, as fully as an interest in the executor; and therefore, nothing more than a power ought to be presumed. In the additional clause too, by which the executor is appointed, such a power is expressly given to him; which is inconsistent with a previous devise of the estate to the same person.

The sentence itself, in the original will, in its very (445) construction, shows that "leave" does not mean "give," since the lands "left" to be sold, are those "not given away." That is saying, that the land specifically devised, was *"given away;"* and by way of contradistinction, that the others were *not* "given" to any person; but were to be sold and the *money given.*

In our opinion, therefore, no estate in the premises passed to Sawyer by the will, but only a power to sell them.

We likewise think they were not devised to the wife and children as a part of "the residue of my estate to be divided between" them. Every devise of land, even by a residuary clause, is a specific devise. It is obvious, that the testator did not intend this residue to embrace any lands specifically. It is given to the same person to whom the slaves are specifically bequeathed; and it is given expressly "after the payment of debts," not merly as a charge, but with a power, likewise expressly created, to the executor to sell. The testator was aware that it might be necessary to sell some part of his estate for the payment of his debts, and he directed this land to be sold. The question is, whether he meant to substitute it for that purpose in the room of his personal estate, and absolutely command the sale, or merely meant it as increase of the fund. We think the former was his intention. The executor was not to have the election to sell the land or the slaves. The direction to sell the land, when spoken to the executor, must be taken to be positive, that the land should be sold first, and at all events; otherwise the specific legacy of the slaves might be defeated by the disposition of the residue, although it was, in the testator's contemplation, to pass through the hands of the executor as a residue, to the same persons who were the donees of the slaves. But in the next place, if the clause for the sale of the land, be not necessarily connected with the payment of debts, as one of the objects of the sale, and rendered imperative upon the executor by the specific dispositions of the other parts of the estate in favour of the same persons, made in other parts of the will, then that
(446) clause is to be read by itself. Thus read, and standing alone, it is a precise and absolute order, that all his land, not before particularly devised, shall be sold at all events and the proceeds divided. Such directions are inconsistent with a devise of the lands as part of the residue; for that would be to give to the same persons, by one and the same instrument, both the proceeds of the lands, and the lands themselves.

It is, indeed, not material to this case, whether the land descended to the testator's children, or was devised to them and his wife. For, if the latter were true, in the event that

has happened, the mother of the lessor of the plaintiff, upon the death of her mother, intestate, became entitled to precisely the same share she would take by descent from her father, upon his intestacy as to these lands, namely, an undivided half. The point would not, therefore, have been adverted to, if the respectable gentleman who presided in the Superior Court, had not declared himself of opinion, that the lessor of the plaintiff must claim under the will, or not at all. As we entertain a different opinion, it is deemed respectful to him to state the points and grounds of the difference.

We concur with him, then, in thinking, that the premises were not devised to the executor, nor to the wife and children. But we do not concur in the opinion, that they did not descend to the children; but on the contrary, think that they did descend; for the very reason, that they were not devised, and therefore necessarily descended. Nothing can defeat the heir, but a valid disposition to another. Whatever is not given away to some person, must descend. The heir takes, not by the bounty of the testator, but by force of the law, even against the express declaration of the testator to the contrary. If the will does not devise the land, but creates a power to sell it, then, upon the execution of the power, the purchaser is in under the will, as if his name had been inserted in it as devisee. But, in the mean time, the land descends, and the estate is in the heir. The power is not the estate, but only an authority over it, and a legal capacity to convey it. These are elementary maxims. But it is supposed, that the testator has disposed of his land, by directing a sale (447) of it absolutely, and a division of the proceeds, so as to turn it out and out, as it is called, into personalty; and that this defeated the descent. When sold, the estate of the heir will certainly be divested; but such a provision in the will is only the creation of a power: it is a disposition of the proceeds of the land, but not a disposition of the land itself; and that consequently descends. The doctrine of conversion is purely equitable. The law knows nothing of it. A court of equity, by considering that as done, which ought to have been done, deals with land ordered to be sold, as if it were sold. But a court of law always looks upon land as land, and has regard only to the legal title, which is unaffected by any power,

whether it be a naked one; or coupled with an interest, or a trust until the power be executed.

Has the estate which descended to the heir, been divested? It can have been divested by means only of the decree of the Court of Equity, or of the deed made by Thomas C. Ferebee, under the authority of that decree or under the authority of his administration. We think, they are all insufficient.

An administrator cannot sell land under a power given to the executor to do so. It is a personal trust, to be executed by the persons on whom it is conferred by the will. The statute 21 Hen. VIII, enables a part of those persons, under certain circumstances, to perform the duty. But the power is not, under any circumstances, transferred to an administrator; nor is he vested in any case, with authority to convey his intestate's land, but in the single one prescribed in our act of assembly of 1797, (*Rev. c.* 478). His deed therefore derives no efficacy from his office.

Nor does it derive any from the decree of the Court of Equity. It is not intended here, to question the operation of the decree upon the interest of Mrs. Ferebee, merely upon the ground that she was not a party to the suit; nor to deny, that the case made in the pleadings was within the jurisdiction of the Court, or that it was a proper one for its interposition. Undoubtedly, it is the doctrine of the Court of
(448) Equity, that it will compel the execution of a power at the instance of those to derive an interest under it: that it will interpose to prevent injurious consequences from arising, even from the extinction of the power; and that a trust shall not, in any event, fail for the want of a trustee. But these ends are not attainable, in reference to a change of the legal title, merely by a decree, that the land shall be sold; nor by a decree that, when sold, it shall be conveyed by a particular person, unless that person actually convey, and unless, also, he hath the legal title, or a power to convey it, which is recognized so to be by the law. The court of equity does not act upon things, but upon persons. It does not adjudicate, that land in controversy legally belongs to one of the parties; but that it belongs to him equitably; and thereupon it decrees, that the party in whom the legal title or power is, shall convey, so as to make the equitable owner, thereby, the legal owner. The decree does not therefore constitute a title

at law; nor enter into it. The title passes by the deed, which the decree compels the party to the suit to execute. If the deed be made by a person who had not the estate, nor a power to convey, it will not pass the title at law, although made under the direction of a court of equity. The person claiming under it must resort to that court for the protection of the rights ascertained in the decree, or derived under it. When it is said, that a court of equity will not allow a trust to fail for the want of a trustee, it is not meant, that the court can appoint a trustee, who, by virtue of the appointment, gets the legal estate; but that the court will hold the legal owner, whoever he may be, to be a trustee, in respect merely of the use that may be made of the legal estate; will raise and distribute the fund according to the trust; and if necessary for the purposes of the trust, will decree and compel such owner to convey. In other words, the court of equity cannot by decree make that a legal title, which a court of law says is not a legal title. In the case under consideration, the Court could have directed a good title, if the proper parties had been before it. According to some opinions, when executors renounce the probate of the will, they may yet execute a power to sell. Sug. Pow., 165. At all events, the conveyance (449) of the executor and the heirs would have passed the title. But the deed of Ferebee, could, at most, pass only his estate as tenant by the courtesy. How far the Court of Equity might now go in decreeing proper conveyances, or whatever it might do to sustain the sale made under its direction, as against the lessor of the plaintiff claiming as the heir of his mother against the vendee of his father, who *jure mariti* was entitled to her share of the money raised by the sale, or claiming under his grandmother, who was a party to the suit, it is not for us, sitting where we are, to say. It is sufficient for the plaintiff here, that his lessor's legal title has not yet been divested.

This question has been treated as if the decree had directed Ferebee to convey. It is but justice to that Court, however, to remark, that it does not. No doubt, the Court did not intend so to direct. It is against the course of the Court to do so, until a sale has been reported and confirmed; which does not appear ever to have been done. It would not have been confirmed, unless the Court could have directed a title

that was good, or the purchaser had been willing to rely on the equitable one under the decree. The latter is the utmost the defendant can now insist on; and that is not a defence in this action.

The observations upon conveyances made under the directions of the Court of Equity, will readily be seen to have no application to sales under execution from that Court, or for partition. In those cases, the deeds of the sheriff and clerk and master operate by virtue of the legal authority expressly conferred by statute.

The statute of limitations does not bar the plaintiff. If actual seizin be here, as in England, necessary to the consummation of the title by courtesy, yet we see no reason to doubt that Ferebee and wife had it. No possession adverse to them is stated. Consequently, they, as the owners, were constructively in the actual possession. Upon such a possession, they could have maintained trespass. Now actual seizin is the possession of land by the freeholder. But furthermore, no possession by the defendant, or those under whom he
(450) claims, prior to this suit, is stated in the case.

The Court is therefore of opinion, that the judgment of the Superior Court is erroneous, and must be reversed; and that judgment, upon the case agreed, be rendered for the plaintiff.

PER CURIAM. Judgment reversed.

Cited: Tucker v. Tucker, 27 N. C., 165; *Proctor v. Ferebee,* 36 N. C., 145; *Winborn v. Gorrell,* 38 N. C., 122; *Floyd v. Herring,* 64 N. C., 410; *Beam v. Jennings,* 89 N. C., 454; *Munds v. Cassidey,* 98 N. C., 562; *Perkins v. Presnell,* 100 N. C., 224; *Gay v. Grant,* 101 N. C., 219; *Holton v. Jones,* 133 N. C., 401.

DECEMBER TERM, 1837.

RALEIGH & GASTON RAILROAD COMPANY v. RICHARD DAVIS.

1. Whether the legislature can in any case take private property for the use of the public, without providing compensation for it? *Quære.* But assuming that it cannot, it does not follow that the payment of the compensation must be precedent to, or cotemporaneous with, the taking. On the contrary, it is competent to the legislature to authorize the taking, leaving the assessment of the *quantum*, and the payment of the compensation, to be made subsequently.

2. The assessment of the damages to be paid to private individuals for property directed by the legislature to be taken for the use of the public, need not be made by a jury of twelve freeholders; it not being a controversy respecting property within the meaning of the 14th section of the Bill of Rights. Nor is it such a "trial by jury" as that section requires to remain "sacred and inviolable."

3. In taking private property for the use of the public, as for a public highway, the legislature is not restricted to a mere easement in the property, but may take the entire interest of the individual, if, in the opinion of the legislature, the public exigency requires it.

4. A railroad company is a private corporation, its outlays and emoluments being private property; but the road constructed by them will be a public highway, and consequently they may, upon paying a fair compensation therefor, take private property, under the sanction of the legislature, for the use of the company, as being for a public use.

The plaintiffs were incorporated by an act of the general assembly passed at December, 1835 (2 *Rev. stat.*, 299) "for the purpose of effecting a communication (452) by a railroad from some point, in or near the city of Raleigh, to the termination of the Greenville and Roanoke railroad, at or near Gaston, on the Roanoke river." After providing for the organization of the company, with the usual faculties of pleading and being impleaded, and purchasing and holding estates real and personal, as far as may be necessary for the purposes of the act, it proceeds in the seventh section "to invest the president and directors with all the rights and powers necessary for the construction, repair, and maintaining a railroad, to be located as aforesaid, and to make and construct all such works as may be necessary and expedient to the proper completion of the road." By the 12th section, the company have immediately "full power to

enter upon all lands through which they may wish to construct the road, to lay out the same," not invading dwelling-houses, &c., and with other restrictions, particularly mentioned. And by the 17th and 21st sections, entry may be made upon the lands thus laid off for the purpose of constructing the road, and upon adjacent lands for the purpose of getting the necessary materials, with a provision in the 22d section for redress by action and double damages, for any wanton or wilful injury to the land, crops, or other property, by an entry for either of these purposes.

To provide for the condemnation of the land thus laid off for the road, or entered upon, after having been thus laid off, and also to provide for a compensation to the owner of the land, is the subject of nine sections of the act—beginning with the 12th and ending with the 20th section. The material provisions of those parts of the act are, that if the company and the owner of the land cannot agree as to the terms of purchase, the former is authorized, after notice to the owner, to apply to the Court of Pleas and Quarter Sessions, and the Court is thereupon required to "appoint five disinterested and impartial free-holders, to assess the damages to the owner from the condemnation of the land for the purpose aforesaid, any three of whom, after being sworn and viewing the premises and hearing such evidence as either party may
(453) offer, may ascertain those damages and certify the same" in a form given in the act: and in making the assessment, "they shall consider the proprietor of the land as the owner of the whole fee simple interest therein, and take into consideration the quality and quantity of the land condemned, the additional fencing that will be required thereby, and all the inconveniences that will result to the proprietor from the condemnation thereof." The report of the free-holders, when thus made, is to be returned by them forthwith to the Court, and "unless some good cause be shown against the report, it shall be confirmed by the Court, and entered of record: whereupon, upon payment or tender of the damages," the land reviewed and assessed as aforesaid shall be vested in the Raleigh and Gaston Rail Road Company, and they shall be adjudged to hold the same in fee simple, in the same manner as if the proprietor had sold and conveyed it to them. "If the Company shall take possession

of any land, and fail for forty days to institute proceedings for its condemnation as aforesaid, or shall not prosecute them with diligence, the proprietor of the land may apply to the Court to appoint the freeholders with the same duties and powers in all respects as before, and the Court shall in like manner affirm or disaffirm the report;" and "when any such report, ascertaining the damages, shall be confirmed, the Court shall render judgment in favour of the proprietor for the damages so assessed and double costs, and when the damages and costs shall be satisfied, the title of the land for which such damages are assessed shall be vested in the company in the same manner as if the proprietor had sold and conveyed it to them."

By other parts of the act, the company is required, under pain of forfeiture, to begin the work within two, and finish it within ten years; and is vested with the exclusive right of transportation on the road, and required to transport all persons and property for certain tolls.

It is a misdemeanor, punishable by fine and imprisonment, to destroy or injure the road, or place any obstruction on it.

By section 25, all machines and vehicles and "all the works of the said company constructed, or properly acquired under the authority of the act, and all profits which (454) shall accrue from the same, shall be vested in the respective stockholders of the company forever, in proportion to their respective shares; and the same shall be deemed personal estate, and be exempt from any public charge or tax for fifteen years."

By the last section, "the corporate powers granted by the act are to enure for ninety years and no longer, unless renewed by competent authority."

The road, as laid out, passes over the land of Mr. Davis, situate in Warren county, and, at November Term, 1836, the company moved the Court of that county to appoint five freeholders to make the assessment, according to the act. Mr. Davis appeared and made known to the Court, that he and the company had been unable to agree touching the price to be paid to him for the land sought to be condemned, or touching the compensation for the inconveniences he must be subjected to by the proposed location of the road. And he refused his assent to the mode of proceeding for settling the

controversy touching the said price and compensation then and there prosecuted by the company, but objected to the same—first, as a violation of the right of private property secured by the 12th section of the Bill of Rights; and, secondly, as depriving him of the right to a trial by jury, which is made inviolable by the 14th section of the same instrument. The Court, nevertheless, appointed the freeholders, and made the order specifying their duties in the words of the statute. At the next term, three of them returned their report in the form prescribed in the 14th section, together with the certificate of the Justice of the Peace who administered the oath to them.

The company thereupon moved to confirm the report and have it entered of record; but the other party opposed the motion, and prayed the Court to dismiss the proceedings. Upon consideration thereof, the County Court refused the motion of the company, and granted that of Mr. Davis; from which an appeal was prayed, which was also refused, upon the ground that no appeal is given in the charter.

The case was then brought into the Superior Court by a *certiorari,* and was there heard on the last Spring Cir-
(455) cuit, before his Honor *Judge Bailey,* when the order of the County Court, dismissing the proceedings, was held to be erroneous, and reversed with costs, and a writ of *procedendo* ordered, commanding the County Court to proceed further in the case according to the said act of the general assembly and the law of the land. From that judgment, Mr. Davis appealed to this Court.

The case was argued at the last term, by *Badger,* for the plaintiffs, and the *Attorney General* and *W. H. Haywood,* for the defendants. The Court continued the case under advisement until the present term, when their opinion was delivered by *Ruffin, Chief Justice;* who, having stated the case as above, proceeded as follows: As no objection was made in either of the Courts below, that the road was laid out so as to cover more land or in a different form than the charter authorizes; or that the freeholders acted irregularly; or that the damages assessed are not a fair and adequate compensation for the fee simple of the land taken and all incidental damages, it must be assumed, that there is no ground for exception in either of those respects. The case is therefore to be de-

cided on the specific constitutional objections made on the part of the defendant.

Upon those questions the Court had the benefit of a full argument at the last term. The impressions received were then so decided, as to have warranted the delivering of our judgment immediately, if it had been necessary; but as the prosecution of the work conducted by this company could not be impeded by the delay, and some of the points made are novel and of much magnitude, in reference to a class of subjects on which there has been recently and probably will be copious legislation, it seemed discreet, before announcing a decision, to give to the argument, and to the whole subject, the deliberation for which the vacation offered the opportunity.

The right of the public to private property, to the extent that the use of it is needful and advantageous to the public, must, we think, be universally acknowledged. (456) Writers upon the laws of nature and nations treat it as a right inherent in society. There may, indeed, be abuses of the power, either in taking property without a just equivalent, or in taking it for a purpose really not needful or beneficial to the community; but when the use is in truth a public one, when it is of a nature calculated to promote the general welfare, or is necessary to the common convenience, and the public is, in fact, to have the enjoyment of the property or of an easement in it, it cannot be denied, that the power to have things before appropriated to individuals again dedicated to the service of the state, is a power useful and necessary to every body politic. Theoretical writers have derived it from the original and full property, in its highest sense, existing in the community or sovereignty of the state before any division among individuals, and they deem the right of resumption for common use to be tacitly reserved by implied agreement. Thus derived, the power has the sanction of compact, which probably furnishes the motive for tracing it to this source as constituting a sanction founded in morals and nature. But practically, it is immaterial whether the right be supposed to have been impliedly reserved because it ought not to be granted, or because is is a portion of the national sovereignty which is inalienable by the government, or whether the right is created by the public necessity, which at the

time calls for its exercise,—its existence in every state is indispensable and incontestible.

A familiar instance of the exercise of the power is the levying of revenue, by taking from the citizen, from time to time, such portions of his property as may be requisite to conduct the government, instituted by the nation. Another instance essentially of the same character, is that of devoting private property to public use as a highway. A nation could not exist without these powers, and they involve also the welfare of each citizen invidually. An associated people cannot be conceived, without avenues of intercommunication, and therefore the public must have the right to make them without, or against, the consent of individuals.

This, too, is not only the right of the nation, constituted by the aggregate body of the people, but it is a right (457) and power of government. It was said at the bar, that it was a sovereign right, and therefore remains with the people of this state, since it is not granted in the Constitution. The position, if true, would destroy the value of the power here and dissolve the government. But it seems to the Court, wholly untenable. It is true the *eminent domain* is a political and sovereign power; so is every other power vested in, or exercised by any government. Before a people institute a government, they are themselves necessarily the possessors of all political power which men, by the natural and divine law, can rightfully exercise over each other. But by the constitution of government, the political powers requisite to the existence of government and to the discharge of those functions for which the community created it, are transferred by the people to the government. From the people, the government derives the power to act on and control the people themselves, unless in those points, in which the government is restricted by limitations of power. With that exception, the powers of the nation become those of the government, save only, that over the constitution of government itself, to abolish or alter it. The government of the United States is an exception to the general principle, from its peculiar construction. To its formation the people of the several states were parties, and they, as the people of several states, have specially delegated to it particular powers for the purpose of making themselves one people, under

one government, for particular purposes only. But these incidental powers, derived by a fair, proximate, and natural implication from those enumerated, or from the purposes of forming the constitution, as declared on its face, have been exercised, and must be yielded. The government of North Carolina, however, is not one of specially delegated powers: it is only one of limited and restricted power.

The Constitution begins by simply "establishing a *government* for this state," and vests "the legislative power in a Senate and House of Commons." There are no grants of power to the legislature except in a few instances, where the power would not seem naturally to arrange itself under the general class of legislative powers, according to precedent usage, as the election of the governor and other high officers. It does not even confer the revenue power, nor that of granting the vacant lands; yet the legislature has always exercised both powers, by levying taxes, and by authorizing dispositions of the public domain, although "the right to the unappropriated soil is declared to be, in a free government, one of the essential rights of the collective body of the people," which means nothing more than that it shall not be seized on by any individual or particular class, but shall be kept or disposed of, for the common benefit of the whole people. This power, or right of *eminent domain,* is likewise possessed by the government, and may be exercised by the legislature or under its authority. Unless vested there, it cannot be called into action, and without it neither the government nor the state could hold together. It is peculiarly fit to be wielded by the legislature—it is a power founded on necessity. But it is a necessity that varies in urgency with a population and production increasing or diminishing, and demanding channels of communication, more or less numerous and improved, and therefore to be exercised according to circumstances, from time to time. The legislature of North Carolina, when it was a province, and since it became a state, have always exercised it, either directly or through the intervention of the Courts that administer the domestic police of the several counties. It is a power which the government is bound to the people to exercise, limited only by a sound discretion as to the number and nature of the roads, and restricted as to the mode of exercising it by the provisions in

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the Constitution, if any such there be. It is contended that there are such provisions, and that the act before us is in violation of them in several respects.

It is said—first, that the right of property involves the right to precedent compensation for it, when taken for public use. It is thence deduced as a corrollary, that the questions whether the property shall be taken, and what com-
(459) pensation shall be paid for it, do constitute a question at law respecting property, and must be tried by a jury, according to Sec. 14 of the Bill of Rights.

If the government can lawfully take private property for public use, without compensation, then, confessedly, there is no controversy to be tried by a jury. But the government may prescribe such terms as may be deemed befitting its own character and the justice of the state. So, though there be a constitutional obligation on the government to make compensation, yet if the compensation need not precede the taking of the property, the condemnation of the defendant's land is not illegal, because he may refer to the constitutional mode of ascertaining and enforcing payment of its value and other damages. It behooves the counsel for the defendants therefore to establish both parts of the proposition.

The right to compensation, as an absolute and legal right, was contested by the counsel for the plaintiffs, and strenuously asserted on the other side. The Court do not decide it, but in this case will assume it to exist as contended on the part of the defendant, though not on all the grounds on which his counsel placed it. The Court cannot adopt some of the several distinct sources from which it was derived.

One of them was the fifth amendment of the Constitution of the United States, providing that "no person shall be deprived of his life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." That has always been understood to be a limitation of the power of the Federal government, and not of that of the states. It was authoritatively so held by the Supreme Court of the United States, in *Barrow v. Baltimore,* 7 Pet., 243; which dispenses with further observations from this Court.

The natural right and justice of compensation, and the nature of our free institutions, were also relied on as suffi-

cient in themseles to create the supposed restriction on this power. But the sense of right and wrong varies so much in different individuals, and the principles of what is called natural justice are so uncertain, that they can- (460) not be referred to as a sure standard of constitutional power. It is to the Constitution itself we must look, then, and not merely to its supposed general complexion. There must be words in it, which, upon a fair interpretation, and in reference to the subject-matter, and to direct consequences, are incompatible with the enactments of the legislature, before a Court can pronounce such enactments null. The principle is, however, so salutary to the citizen, and concerns so nearly the character of the state, that it may well be urged that it must be consecrated by its adoption in some part of the free Constitution of this state. We should be reluctant to pronounce judicially, our inability to find it in that instrument. If it be not incorporated therein, the omission must be attributed to the belief of the founders of the government, that the legislature would never perpetrate so flagrant an act of gross oppression, or that it would not be tolerated by the people, but be redressed by the next representatives chosen. There is no doubt that while the legislature and people of this state expressly restrict the action of the general government on this subject, it must have been supposed by the people that their own local government was in like manner restrained, or would never act in a manner to make such a restraint necessary. There is, however, no clause in that instrument which seems to bear on the point, unless it be that which is relied on in the argument for the defendant. It is the 12th Sec. of the Bill of Rights which declares, "that no freeman shall be disseized of his freehold, or deprived of his life, liberty or property, but by the law of the land." Under the guaranty of this article, it has been held, and in our opinion properly held, that private property is protected from the arbitrary power of transferring it from one person to another. We doubt not that it is also protected from the power of despotic resumption, upon a legislative declaration of forfeiture, or merely to deprive the owner of it, or to enrich the treasury, unless as a pecuniary contribution by way of tax. Such acts have no foundation in any of the reasons on which depends the power in virtue of the right of eminent

(461) domain, to take private property for the public use, and they could not be sustained by the offer of the fullest compensation. Though not so obvious, it may also be true that the clause under consideration is restrictive of the right of the public to the use of private property, and impliedly forbids it, without compensation. But it is a point on which the Court is not disposed, nor at liberty, to give a positive opinion on this occasion. It is not required as a preventive warning against unjust legislation. For it is more inadmissible to suppose that the legislative acts will be designed to work oppression and wrong, than to violate the constitution directly. It is not deemed probable, and with difficulty conceived to be possible, that the legislature will at any time take the property of the citizen for public use, without at the same time providing some reasonable method of ascertaining a just compensation, and some certain means of paying it. Moreover, it is not open to the Court to give the definitive opinion demanded, because it does not in our judgment necessarily arise here, and it is indecent to decide so grave a question extra-judicially. Here the statute does give compensation fair and liberal, embracing not only the direct, but all incidental and consequential damages. For the purpose of this cause, therefore, it may be taken for granted, that compensation is in all cases requisite, as no doubt it will in all cases be made. But with this admission, the Court is of opinion that the proposition of the defendant's counsel, as to the mode of ascertaining it, and the period of payment, is not sound.

Unless the compensation must precede the seizure of the property, it is true that in many cases, one of the principal securities for it is impaired, and by possibility may be lost; that of the judicial enforcement of the right. When the property is taken for the public directly, and the payment is to be made out of the treasury, the compensation cannot be made the subject of litigation against the state, but the party must rely on the integrity of the legislature and the general will, to have equal right done to all. Yet it seems impossible to lay it down as a principle, that compensation is indispensably a condition precedent; and this must be added to the examples already known, in which an injunction of the

(462) Constitution cannot be made the subject of judicial

cognizance, but finds its only sanction in the understanding and conscience of the legislator. The exigencies of the public may be too urgent to admit of the delay requisite to the simplest mode of previous investigation. In time of war, for example, an army must have food, or ammunition or quarters, a field for encampment, or an entrenchment for defence, and the necessity is pressing and immediate. Other instances suggest themselves, in which a previous assessment cannot be had with any reasonable hope of doing justice. The act before us supplies one such in Sec. 21. It authorizes an entry into lands adjacent to the road, to cut, quarry, dig, and carry away wood, stone, gravel, or earth for the construction or repair of the road. And for those materials, and for all incidental damages done in taking or carrying them away, reasonable compensation is to be assessed by three freeholders, upon view and on oath. In the like manner, our public road law directs the overseer to cut timber and dig earth for bridges and causeways, and gives the owner a petition to the County Court for adequate compensation, to be fixed by the justices, out of the county funds. Antecedent assessments, in such cases, must be made entirely at a venture, for it is uncertain what quantity of materials will be requisite or can be procured at a particular place, or how many tracks may be broken on the owner's land, and even the weather and season of the year may materially vary the damage. Therefore, the acts must almost necessarily provide for payment for injuries done, which can be seen, known, and truly estimated. The compensation, to be adequate, must be subsequent.

It may be observed that in this, we only adopt the established course of legislation and adjudication in that country from which we derive Magna Charta and most of the other free principles declared in our Bill of Rights. The case of *Boyfield v. Porter,* 13 East, 200, is a decision upon a similar act of parliament which confines the owner of the land to the remedy given by the act. The case is cited with an acknowledgement, that it is not an authority upon the question of legislative power in America; for that in (463) England is unquestionably transcendent, and ours is as certainly limited. But when it is recollected, with what reverence the great charter has ever been held by both branches of that legislature, and especially by that which is

popular; and when, moreover, it is called to mind, that the rights of private property have never been more respected than in that country, where it is carried to the extent, perhaps, injurious, of sucessfully opposing great political reforms, and generally prevents the abolition of even a public office without compensation to the incumbent, it may reasonably be inferred, that neither the parliament, nor the courts, nor the people of that country, perceived an infraction of the Magna Charta in those statutes. As practical evidence of the true sense of that clause of it, which has been transferred into our Bill of Rights, those legislative and judicial proceedings, though not authority, are entitled to much respect. In a still greater degree, does the legislation of our own country, commencing at an early period of our provincial state, and continued up to the present time, upon the subject of laying out roads and making compensation, claim our attention as an authoritative exposition of the general sense through a long course of time, of the relative rights of the public and of individuals. It establishes or recognizes, on the one hand, the obligations of the public to pay a fair remuneration for injuries to individuals for the public service; but, on the other, it evinces the settled usage, and thence the legality of providing that the compensation may be antecedent, or subsequent to the injury, as the necessities of the public for the property may be immediate or otherwise, and according to the convenience of both parties for truly estimating the amount. In the Constitution of New York, is contained an express clause for compensation for private property taken for public use; and it is there settled also, that neither the payment nor the assessment need precede the opening of a road over the land of an individual. *Core v. Thompson,* 6 Wendell, 634. Indeed,

(464) the principle applies alike to every entry on the land, and would exclude one even for examination and survey, if correct. The Court concludes, therefore, that it is competent to the legislature to take private property for the public use, without a previous or contemporaneous payment of its value.

If the foregoing reasoning be just to establish the result declared, it seems to go far also to show that it is in the discretion of the legislature to appoint the tribunal by which the compensation shall be assessed. If the obligation on the

legislature to make compensation be perfect and constitutional, it may be competent to the judiciary to declare that the title of the individual was never divested, if the legislature were to refuse, or for a long time delay, to make any compensation. Yet, if that which appears to be just, or does not appear to be insufficient, be provided and offered by the legislature, however it may have been fixed on, there is no ground for the interposition of the Courts. It is said, if this be true, the party to the controversy nominates the judges to decide, and might, indeed, make the decision directly without a reference to any other person. Perhaps the act might be found so nearly allied to the judicial functions as to be forbidden to the legislature. If it be not, the Court is not aware of anything to prevent a legislative assessment, except propriety, and the unfitness of large bodies for the impartial and minute investigations necessary to the justice of such cases. It is not likely that the attempt will ever be made, even in point of form, unless to carry into effect a previous agreement of parties. At all events, it was not done in this instance, but the decision was referred to persons judicially selected, impartial, and acting under oath, with opportunities for full information from evidence and from view. To such a tribunal no objection seems to be furnished by the principles of justice, or by the provisions of the Constitution.

It was, however, contended at the bar, that it is an evasion of the spirit, if not a violation of the express words of the fourteenth section of the Bill of Rights, by which, "in all controversies at law respecting property, the ancient mode of trial by jury is to remain sacred and inviolate."

This is a controversy *at law*. Is it also one *respecting* property? In what sense is it so? The necessity (465) for the road between different points is a political question, and not a legal controversy; and it belongs to the legislature. So, also, does the particular line or route of the road, whether it shall or shall not be laid out so as to pass over the lands of particular persons; and that has also been decided by the legislature or referred to scientific engineers. The only subject for the consideration of the jury is, therefore, the quantum of compensation. Reduced to that point, the case of *Smith v. Campbell*, 10 N. C., 590, is a decision that it is not a controversy "respecting property," within the sense of the

Bill of Rights. But the remaining words of the clause yet more clearly exclude this case from its operation. "The ancient mode of trial by jury," is the consecrated institution. This expression has a technical, peculiar, and well understood sense. It does not import that every legal controversy is to be submitted to and *determined* by a jury, but that *the* trial by jury shall remain as it anciently was. Causes may yet be determined on demurrer, and that being an issue of law is determined by the Court. Final judgment may also be taken on default, when the whole demand in certainty is thereby admitted; as is provided for actions of debt by the act of 1777, which was passed by nearly the same persons who composed the Congress of 1776. Interest at a certain rate, fixed by law upon notes as well as bonds, and in actions of assumpsit, is computed by the clerk; and costs, in all cases, taxed by him. These are all controversies respecting property in the same sense with the present, but they are none of them trials or cases for trials by jury. There is no *trial* of a cause, standing on demurrer or default. *Trial* refers to a dispute and *issue* of fact, and not to an issue of law, or inquisition of damages. The terms of this section are with respect to the controversies mentioned in it, analogous to those in the ninth section with respect to criminal prosecutions. That provides that "no freeman shall be convicted of any crime, but by the unanimous verdict of a jury." Judgments may be (466) undoubtedly given in indictments on demurrer, on the prisoner's standing mute and refusing to plead, upon submission and upon *cognovit*—when therefore a conviction by verdict is spoken of, it has in view only the case of a plea by the accused and issue on it. That raises a question which can be *tried* only by jury, and determined against the accused only by the unanimous consent of the jury. "Trial by jury" in civil cases, is equivalent to "conviction by verdict" in criminal proceedings. They do not include by force of those terms, any case in which there is not an issue of fact. It is the course, both in England and this country, to resort to this favorite Anglo-Saxon mode of determining all legal controversies, as well as trying issues, civil and criminal, where it can be used without great inconvenience. It might have been adopted in this instance, and probably would have been prescribed in the act, but for the delay, expense and

difficulty of proceeding by writ of *ad quod damnum* on so long a road, passing over the lands of so many proprietors. But it is not indispensable in such a case, because it is not embraced in the words used in the Bill of Rights. Many of the state legislatures, to whose codes we have had access, have proceeded in a similar way; and it has received judicial approbation. In New York, it was held by *Chancellor Walworth,* in *Beekman v. R. R.,* 3 Paige, 45, that the ascertaining the damages by commissioners, was not repugnant to that part of the Constitution of that state which preserves the trial by jury. In *Livingston v. New York,* 8 Wendell, 85, the same point was ruled unanimously, both in the Supreme Court and in the Court of Errors. In *Livingston v. Moore,* 7 Pet., 469, the distinction upon the words "trial by jury" is explicitly expressed by the Supreme Court of the United States. It arose upon these words in the Constitution of Pennsylvania, "Trial by jury shall remain as heretofore." The Court say, "the distinction between trial by jury, and inquest of office is so familiar to every mind, as to leave no sufficient ground for extending to the latter that inviolability which could have been intended only for the former." In the same light does the subject seem to have been viewed by our legislature in passing a variety of acts. Not to mention the (467) numerous charters for roads and canals, with provisions similar to that now before us, the first mill act and those for partition and others, substitute commissioners for a jury to assess the value in the one case, and to make the division in the other, with power to charge one lot with money to be paid to the other.

The opinion of the Court is, that it was competent to the legislature to adopt the mode it did, for the assessment of the damages to the defendant.

It is further objected, that the charter takes more than the right of eminent domain authorizes. It is said, that the *public* is only entitled to the *use* of private property, leaving the property and right of soil in the proprietor; and that here the whole fee is taken and not for the public, but for the company, which is but a private corporation.

The doctrine of the common law is, that the public has only an easement in the land over which a road passes, and that the right of soil is undisturbed thereby. The reason

is, that ordinarily the interest of the public requires no more. Every beneficial use is included in the easement, in respect at least to such highways as existed at the time the principle was adopted, and to which it had reference. But if the use requisite to the public, be such an one as requires the whole thing, the same principle which gives to the public the right to any use, gives the right to the entire use, upon paying adequate compensation for the whole. It is for the legislature to judge, in cases in which it *may* be for the public interest to have the use of private property, whether in fact the public good requires the property, and to what extent. From the great cost of this road, from its nature and supposed utility, it seems to be contemplated to preserve it perpetually, or for a great and indefinite period. All persons are excluded from going on it, unless in the vehicles provided by the public or its agents; and to enforce that provision and adequately protect the erections from injuries, it may be requisite to divest the property out of individuals. But whatever may be the rights of the public in this respect, the question does not arise in the present stage of the controversy. The charter (468) seems to be ambiguously expressed upon this part of the subject. It bears the marks of having been drawn for a perpetual charter, and to have lost that character by the addition of the last section, without corresponding alterations in those preceding. We suppose it clear, however, that it was intended to divest the right of soil at all events for the corporate term as now fixed, or as it may be extended. It seems equally clear, notwithstanding the words of perpetuity in the 16th and 25th sections, that no more is divested out of the defendant, than, upon the whole act, is vested in the corporation, or may be vested in it by a future act. As this may in that way continue forever, the legislature properly required the whole property to be paid for. But the rights of the defendant are not therefore necessarily extinguished. There may be a reversion in him, that will come into possession at the forfeiture or expiration of the charter. If so, at the proper periods, and when the question shall be presented in the proper form, it will doubtless be decided. At present, the only question is, whether the land shall be condemned for the purpose of the road, and on what terms; and the right of soil is not, in our

opinion, involved. To condemn it, there must be a report confirmed and recorded; but the effect of that proceeding on the right of property, can only be determined, when a suit is brought, founded on the right of property. It would be improper that the present judges should volunteer their private opinions on it.

Upon the supposition that the legislature may take the property to the public use, it is next said, that this taking is not legitimate, because the property is bestowed on private persons. It is true that this is a private corporation; its outlays and emoluments being individual property; but it is constituted to effect a public benefit, by means of a road, and that is *publici juris*. In earlier times, there seems to have been a necessity upon governments, or at least it was a settled policy with them, to effect everything of this sort by the direct and sole agency of the government. The highways were made by the public, and the use was accordingly free to the public. The government assumed the exclusive direc- (469) tion as well as authority, as if they chose to be seen and felt in every thing, and would avoid even a remote connection between private interests and public institutions. An immense and beneficial revolution has been brought about in modern times, by engaging individual enterprise, industry, and economy, in the execution of public works of internal improvement. The general management has been left to individuals, whose private interests prompt them to conduct it beneficially to the public; but it is not entirely confided to them. From the nature of their undertaking and the character of the work, they are under sufficient responsibilities to insure the construction and preservation of the work, which is the great object of the government. The public interest and control are neither destroyed nor suspended. The control continues as far as it is consistent with the interests granted, and in all cases as far as may be necessary to the public use. The road is a highway, although the tolls may be private property, by force of the grant of the franchise to collect them. It is a common nuisance to allow it to become ruinous or to obstruct it. The government may, upon sufficient cause, claim a forfeiture of the charter, or compel the execution and repairs of the road by those undertaking them, by any means applicable to other persons charged with the like

duties in respect to other highways. The difference is, that the corporation, in lieu of the sovereign, has the custody and property of the road, and the collection of the tolls, in reimbursement of the cost of construction and remuneration for labor and risk of capital. As to the corporation, it is a franchise, like a ferry or any other. As to the public, it is a highway, and in the strictest sense, *publici juris*. The land needed for its construction is taken by the public for the public use, and not merely for the private advantage of individuals. It is only vested in the company for the purposes of the act; that is, to make the road. This case is therefore essentially different from that of *Hoke v. Henderson,* 15 N. C., 1, which was so much insisted on at the bar. There, the office, a subject of property to a certain extent, was taken from (470) one and vested in another, exactly in the same state and to the same public purposes as it was held by the first. The public interest was in the service of the officer, being precisely the same, with either person for the incumbent. It was therefore taken solely for the benefit of the new appointee, which could not be supported. But in this case, the land is taken from the defendant for a public purpose, to which it had not been applied while in his hands. It is taken to be immediately and directly applied to an established public use, under the control and direction of the public authorities, with only such incidental private interests as the legislature has thought proper to admit, as the means of effecting the work and insuring a long preservation of it for the public use.

It is the opinion of the Court, that no one of the objections is sufficient to arrest the proceeding for condemnation, and that the judgment of the Superior Court must be affirmed. This will be certified to that Court, that a writ of *procedendo* may issue thence to the County Court.

PER CURIAM. Judgment reversed.

Cited: State v. Newson, 27 N. C., 251; *State v. Rives, Ib.,* 310; *Freedle v. R. R.,* 49 N. C., 91; *State v. Glenn,* 52 N. C., 331, 334; *Gatlin v. Walton,* 60 N. C., 334; *Froelich v. Exp. Co.,* 67 N. C., 7; *McIntire v. R. R., Ib.,* 279; *Johnston v. Rankin,* 70 N. C., 555; *State v. Pool,* 74 N. C., 408; *R. R. v. R. R.,* 83 N. C., 498; *Eliason v. Coleman,* 86 N. C.,

241; *State v. McIver,* 88 N. C., 690; *R. R. v. McCaskill,* 94 N. C., 751; *State v. Lyle,* 100 N. C., 501; *Allen v. R. R.,* 102 N. C., 386; *McLaughlin v. Mfg. Co.,* 103 N. C., 107; *R. R. v. Parker,* 105 N. C., 248; *State v. Wilson,* 107 N. C., 870; *Staton v. R. R.,* 111 N. C., 283; *McQueen v. Bank, Ib.,* 515; *Jones v. Com'rs,* 130 N. C., 454; *Phillips v. Tel. Co., Ib.,* 520; *R. R. v. Newton,* 133 N. C., 134.

HENRY ADCOCK v. ALFRED FLEMING.

Where the plaintiff received notes in discharge of one which he held against the defendant, and the latter refused to endorse them, but promised to pay them, if the plaintiff should fail to collect them, *it was held,* that the promise was a guaranty of the notes; and that an action upon the promise was not within the jurisdiction of a single magistrate.

The cases of *O'Dwger v. Cutler,* 12 N. C., 312, and *Bell v. Ballance,* Ibid 393, approved.

After the new trial granted in this case at the last term, (*ante,* 225,) it came on to be tried again at Chatham, on the last Circuit, before His Honor, *Judge Saunders,* when it appeared that the defendant was indebted to the plaintiff upon a note in a balance of twenty-five dollars; that in discharge of this balance the defendant passed to the (471) plaintiff two notes payable to the defendant, amounting together to that sum; that the defendant refused to endorse these notes, but engaged to pay the amount if the plaintiff should fail to collect them; that the plaintiff received them upon the faith of this promise, and surrender the note which he held of the defendant. The plaintiff having failed to collect the notes, and having given due notice of the failure, warranted the defendant upon this promise. His Honor instructed the jury, that if the promise relied on were to pay the balance due on the old note at the time of settlement, the plaintiff might recover in this action, but if the promise were to make good the two notes delivered to the plaintiff in discharge of the old note, then the plaintiff could not recover. The jury found a verdict for the plaintiff; and the defendant appealed.

Neither of the parties were represented in this Court.

GASTON, Judge.—When this case was formerly before us, we were of opinion that the plaintiff could not recover, because his claim was founded on a guaranty, of which a single justice had not jurisdiction. It is now presented to us under an aspect somewhat different. (His Honor here stated the facts of the case as above, and then proceeded.) It is difficult to define with precision the nature of the demands of which the legislature has given cognizance to magistrates, and we can only hope to approach this precision by adhering steadily to the principles sanctioned by former adjudications. In *O'Dwyer v. Cutler,* 12 N. C., 312, the defendant, for value received, had transferred to the plaintiff a note of Arthur Lawrence, for ninety-five dollars, and covenanted under seal to guaranty the said note to the plaintiff, and the Court held that the jurisdiction of a justice under the act of 1820 (see 1 *Rev. Stat.* c. 62, sec. 6), did not embrace the case; that the subjects of such jurisdictions were "bonds, notes, and liquidated accounts;" that here there was a guaranty under seal on which the sole remedy was by action of covenant to recover damages for the non-performance of the covenant. This was not indeed a *direct* decision upon
(472) the import of the terms used in the acts (see 1 *Rev. Stat. ubi supra*), giving jurisdiction to magistrates of demands under sixty dollars, which are "debts and demands for a balance due on any specialty, contract, note or agreement, or for goods, wares and merchandise sold and delivered, or for work or labor done, or for specific articles due by obligation, note or assumpsit." But we regard it as necessarily settling the import of these terms, since the act of 1820 extended the jurisdiction over the *same subjects* which were embraced in the former acts, wherever the balance was evidenced by *bond,* note, or liquidated account. If the demand of O'Dwyer would have fallen within the magistrate's jurisdiction, had it been for a sum less than sixty dollars, the extended jurisdiction of the act of 1820 would have embraced it because "due on a bond." We therefore felt ourselves bound to hold, whatever might have been our opinion but for the adjudication referred to, that a single magistrate had not jurisdiction of promises to guaranty a note passed away for

value. In *Bill v. Ballance,* 12 N. C., 393, it was decided, that where goods were sold to be paid for in notes, the vendee agreeing to take back the notes if not good, the vendor was authorized, on ascertaining the insolvency of the payers, to return the notes, and upon a tender and refusal, was remitted to his contract for the goods sold, and if the price thereof did not exceed the sum of sixty dollars, he might warrant for that price as a balance due for goods, wares and merchandise sold and delivered. The principles to be extracted from these decisions are, that one may warrant for a sum under sixty dollars due upon a contract originally cognizable before a single magistrate, where *that* contract remains in force; and that such a contract is not *extinguished* by receiving notes upon a condition to become a payment if collected, and to be returned if they cannot be collected, although by the terms of the condition an obligation is imposed upon the creditor to use due diligence to procure the collection; but that a warrant will not lie upon a promise to guaranty notes which have either been purchased or received in satisfaction of a pre-existing demand. The distinction may perhaps for practical purposes be thus stated. A plaintiff (473) may warrant upon any demand of which in terms jurisdiction has been given to a magistrate, although the investigation of the demand may lead to inquiries into subjects of which direct jurisdiction has not been given. But a warrant cannot be sued out upon any demand of which the law has not given jurisdiction to a magistrate.

Applying these principles to the case now under consideration, we are led to the conclusion, that there was error in the instructions given to the jury. His Honor (as we understand his charge), submitted to them as a question of fact, whether the promise made at the time of transferring the notes to the plaintiff might not be regarded as a mere promise to discharge the balance unpaid on the *old note.* No doubt, where a note has been simply received on account of an existing debt, the presumption is that it was taken, not in satisfaction, but as a mode of procuring satisfaction thereof; and if it cannot be collected after the exertion of due diligence, the creditor is remitted to his original demand. But upon the evidence set forth in this case, the notes were not taken as a mode of procuring satisfaction, but in discharge of the balance due the

plaintiff; they were thus taken because of the promise of the defendant to pay the amount called for by them, or any part thereof, if not collected from the makers of the notes: the old note thus satisfied was delivered up to the defendant; and the remedy of the plaintiff is not upon that old note, but altogether upon this promise. Now this promise must be viewed as identical with a promise to guaranty the notes. There is no essential difference between an undertaking to *pay* the amount if it cannot be collected upon the notes transferred, and an undertaking to make good the amount of the notes so transferred. The judge either submitted to the jury an inquiry of fact which the evidence did not warrant—or held that a justice had jurisdiction of an action founded upon this special promise. The judgment is to be reversed, and a new trial is directed.

PER CURIAM. Judgment reversed.

Cited: Lewis v. Bradley, 24 N. C., 305; *S. C.,* 28 N. C., 303; *Ashford v. Robinson,* 30 N. C., 116; *Nichols v. Bell,* 46 N. C., 33.

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(474)

HENRY WRIGHT, qui tam, v. DAVID McGIBBONY.

A return by the sheriff of satisfaction to an execution issued on a judgment for a debt infected with usury, is not sufficient evidence of the receipt of the usurious interest, to charge the lender in an action for the penalty.

This was an action of Debt, to recover the penalty imposed by the statute against usury. On the trial before *Saunders, J.*, at Guilford, at the last Circuit, it appeared in proof, that one Alcy Merrett, had borrowed one hundred and twenty-five dollars of the defendant, who took a note at twelve months for one hundred and thirty-nine dollars, on which he brought suit and obtained a judgment, and sued out a *fi. fa.* This execution was returned "satisfied," by the sheriff, and was so entered on the clerk's execution docket. There was no evidence of the money being paid to the defendant, unless the above return an entry be considered such evidence. His Honor

being of opinion against the plaintiff, he submitted to a nonsuit and appealed.

W. A. Graham, for the plaintiff, contended, that the return of satisfaction on the execution by the sheriff, and its entry on the clerk's docket, was *prima facie* evidence of a receipt of the money by the plaintiff in the execution. That the receipt by the sheriff was a receipt by the plaintiff; and he referred to the case of *Dawell v. Vannay,* 14 N. C., 43.

J. T. Moorehead, for the defendant, insisted, that an actual receipt by the lender was necessary to constitute an usurious taking; and in support of his position, cited the cases of *Isom v. Johns,* 2 Mumf., 272, and *Cator v. Stokes,* 1 Maule & Selw., 600.

DANIEL, Judge. The offence of usury is not complete until the lender has actually received the excess of interest in money, or money's worth. *Maddock v. Hammet,* 7 Term, 180. The defendant had made a loan of one hundred and twenty-five dollars, and taken the note of the borrower at twelve months thereafter for one hundred and thirty-nine dollars. He obtained a judgment on the note, and sued out execution, and the sheriff returned the same "satisfied," and it was so entered on the clerk's execution (475) docket. The question was, whether the aforementioned return by the sheriff was sufficient evidence of the fact of the defendant's having received the amount of the execution, or the illegal excess of interest for the money loaned. The judge was of the opinion, that the return of the execution "satisfied," was not of itself sufficient evidence that the defendant had actually received usurious interest on the money loaned. The two authorities cited by the defendant's counsel, although not exactly in point, are very strong in support of the opinion of the judge. In assumpsit for money had and received, it is a rule that the plaintiff must prove that the money came into the hands of the defendant. 2 Stark. Ev. 62. In *Isom v. Johns,* 2 Mumf., 272, the Court held that money levied by the sheriff under an execution issuing on a judgment which is afterwards reversed, cannot be recovered back in assumpsit on a count for money had and received, without proof that the money was actually received by the

plaintiff in that execution, or applied to his use. In *Cator v. Stokes,* 1 Maule & Selw., 600, it was held, that the sheriff's return to a writ of *fieri facias,* that he has levied the money, is not sufficient evidence to prove that he has paid it over to the judgment creditor, so as to charge the latter with the receipt of it in an action for money had and received, brought by the assignees of the first defendant, a bankrupt. The defendant may have repented, and taken only the principal and legal interest; or it may be that he has never received either principal or interest. We are of the opinion, that the judgment rendered in this case was correct, and that the same must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Jones v. Herndon, 29 N. C., 84.

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(476)

JOHN GOODBREAD, Adm'r of DAVID DICKEY, Chairman, &c., for the use of JOHN HALFORD v. NEWMAN WELLS, et al.

1. The death of the master excuses the performance of the covenant for teaching, boarding, &c , required to be inserted in the indenture of apprenticeship; but if he covenant to do a collateral act, as to give the apprentice a horse, his executors are bound to perform it.

2. A master has the whole term of apprenticeship to perform his stipulation to teach the apprentice; and if he dies without performing it, but so long before the expiration as to leave time for performance had he lived, no action lies for a breach of it.

This was an action of covenant, brought for the benefit of an apprentice against the administrators of his master, upon an indenture of apprenticeship, containing, besides the usual stipulations on the part of the master, one that he should give the apprentice "at freedom one horse worth fifty dollars over and above what the law allows." The deed was executed in 1820; the master died in the fall of 1823; and the apprentice came of age in the fall of 1827. The plaintiff assigned five breaches to-wit,—

1st. That the apprentice was not learned to read and write in the lifetime of the master.

2nd. That the apprentice was removed out of the county in the lifetime of the master.

3d. That after the death of the master the apprentice was not properly clothed and fed.

4th. That after the death of the master the apprentice was not learned to read and write.

5th. That after the death of the master, and when the apprentice came of age, his freedom suit, and a horse worth fifty dollars were not delivered to him.

Plea, *performance.*

On the trial at Rutherford, on the last Spring Circuit before *Pearson, J.,* the plaintiff proposed to introduce evidence in support of the third, fourth, and fifth breaches, but His Honor was of opinion, "that no breach after the death of the master could be supported; that from the nature of the subject matter of the contract, it terminated (477) by the death of either the apprentice or the master; that the representative of the master was not entitled to the services of the apprentice and was not bound to carry out the covenant; and had acted right in refusing to have any thing to do with him." The plaintiff then proposed to prove that the master had removed from the county of Rutherford, and carried the apprentice with him; but the Court was of opinion that this breach could not be sustained, as there was no stipulation to the contrary in the covenant.

The plaintiff then proved in support of the first breach, that the apprentice was not able to read or write, and barely knew his letters. The defendant, for the purpose of showing that the master in his lifetime had evinced no disposition to break this part of his covenant, then proved that the boy had been sent to school by him some few weeks; that he was small and sickly, and not well able to work.

His Honor charged the jury, "that it was the province of the Court to put a construction upon the covenant; and that it did not require the master to learn the boy to read and write at any particular time of the appreticeship, but allowed him the whole period to perform this stipulation; and if they believed there was reasonable time after the death of the master in 1823, before the boy's arrival at age in 1827, in which to have learned him to read and write, then there was no breach in this respect in the lifetime of the master: that

the master had his election to learn the boy to work first and then to read and write, or to learn him to read and write first, and then to work: and that by his death the contract was terminated; and unless there had been a breach in his lifetime, the plaintiff was not entitled to recover." The defendant had a verdict; and the plaintiff appealed.

Burton and *Caldwell,* for the plaintiff.
Swain, for the defendant.

DANIEL, J.: We have examined this case; and we are of opinion, that the judge was correct as to the law (478) upon each and every point decided by him, except one. The covenants which the law required the master to enter into, and which this indenture contained, were, as we think, discharged and released by the death of the master. But we see that Harman, the master, in this deed agreed to do a thing, at the coming of lawful age of the apprentice, which the acts of assembly (1 *Rev. Stat.* c. 5, sec. 3) did not require him to covenant for in the indenture. He agreed "to give him" (J. Halford) "one horse worth fifty dollars over and above what the law allows." The administrators of the master cannot plead the act of Providence, the death of the covenantor, as a discharge of this undertaking, as he well might, in not himself complying with those stipulations which the act of assembly had actually required the master to covenant for, and the master himself to do and perform, or have performed, during the time the relationship of master and apprentice continued. That relationship was dissolved by the death of the master. This isolated covenant to furnish the horse worth fifty dollars, rests on the footing of any other undertaking by deed that a man will do a particular thing, lawful in itself, at a future day. If the man who thus covenants dies before the day of performance, the obligation to do the thing or have it done, devolves upon his personal representative; and if he fail, the law will give the covenantee his action to recover damages. We therefore are of opinion, that a new trial must be granted.

PER CURIAM. Judgment reversed.

Cited: Allison v. Norwood, 44 N. C., 416.

(479)

Den ex dem. ELI HARRELL et Ux. v. MARGARET HOSKINS.

In a will, the words "my will and desire is, that all my property that I have not before given away and lent, to be equally divided between," &c., carries to the devisee every reversionary interest of the testator which has not been before specifically devised, whether they were in his contemplation or not, and whether known or unknown by him, unless there is a manifest intention to confine them to other interests; and a subsequent contingent limitation to the children of one of the devisees, is not sufficient to raise this intention.

Ejectment in which the following facts were submitted, as a case agreed, to *Pearson, J.,* at Gates, on the last Circuit.

William Gatling the elder died in the year 1809, having first made his will, which was duly proved, in which, after the common recital of an intention to dispose of all his "goods and estate," he proceeded as follows:

"I lend unto my son William Gatling my sand bank "land, and the land which I bought of, &c., and also all my "land that I have not lent and given away, during his nat- "ural life. I also lend unto my son William Gatling the "following negroes, viz., &c., during his natural life. Also "I lend, after the death of my wife Selah Gatling, unto my "son William Gatling, all the land as (that) I before lent "to her during her natural life.

"My will and desire is, that all my property as (that) I "have not before given away and lent, to be equally divided "between my son William Gatling and Elizabeth Bond, and "my wife Selah Gatling and Etheldred Boyd Gatling, to them and their heirs forever.

"My will and desire is, that if my son William Gatling "should have any children lawfully begotten, then I give all "the property as (that) I lent unto my son William Gatling, "to them and their heirs forever."

William Gatling, the devisee, died without issue. The *feme* lessor of the plaintiff was a grandchild of the testator. If William Gatling the younger took in fee, then judgment was to be entered for the defendant. If (480) he took an estate for life, with a contingent limitation to his children in fee, and the ulterior interests descend-

ed to the heirs at law of the testator, judgment was to be entered for the plaintiff for one undivided half of the premises. If this ulterior estate passed under the residuary clause of the will, then the lessors of the plaintiff were entitled to one undivided fourth part, and the judgment was to be entered accordingly.

His Honor gave judgment for one-half of the land in dispute; and the defendant appealed.

Iredell, for the defendant.

No counsel appeared for the plaintiff.

GASTON, Judge: We collect from the transcript in this case, that a general verdict was rendered for the plaintiff, subject to the opinion of the Court, upon a case agreed, as to the legal construction of the will of William Gatling the elder. If under that will William Gatling the younger took a fee simple in the lands in controversy, it was agreed that judgment should be rendered for the defendant; if he took an estate for life with a contingent limitation thereafter to his children, and the ulterior estate of the testator descended to the testator's heirs at law, the plaintiff was to have judgment for an undivided half of the premises set forth in the declaration; but if this ulterior estate was disposed of by the will under what was claimed to be a residuary devise, then the plaintiff should have judgment for an undivided fourth part only of the premises. The Court below adopting the second of these interpretations, gave the plaintiff judgment for a moiety; and the defendant appealed.

It is clear that William, the son, did not take a fee. The will in terms restricts the devise to him to a devise for life, and the devise to his children, if he should have any, is to them as purchasers.

The only question admitting of controversy, is whether the testator made any disposition of the ulterior interest in him remaining after the devise to his son William for life; and the devise to William's children in fee. The (481) clause which is supposed to contain this disposition is in these words: "My will and desire is, that all my property as I have not before given away and lent, to

be equally divided between my son William Gatling, and Elizabeth Boyd, and my wife Selah Gatling and Etheldred Boyd Gatling, to them and their heirs forever." The words "all my property," unless they are explained by other words in the will to have a different meaning, embrace every subject of property and every interest therein which belonged to the testator. The word "estate" is confessedly sufficient for these purposes; and in holding it to be thus sufficient it has been said to import the entire property of the testator. *Nichols v. Butcher,* 18 Vesey, 193. That the word property, if not so qualified by the context as to require a narrower signification, comprehends the real estate of the testator, was said by this Court in *Clark v. Hyman,* 12 N. C., 383, to be fully settled. If it were not, it is manifest in this case, that the testator meant by it real as well as personal property. Every subject of disposition mentioned in the will is fully given away, except the lands and negroes lent to his son for life. The clause under consideration speaks of property not before given away or lent—and there is nothing to which the term property before lent can apply, except to these lands and negroes, and these are certainly both comprehended under the designation of property in the clause immediately following, in which he gives to the children of William "all the property as I have before lent to my son William." The devise then of all the property not previously disposed of, either by gift or loan, is a residuary devise, and will carry with it every reversionary interest in the testator which has not been specifically devised, whether such interest were in the contemplation of the testator or not, and whether it were known or unknown to him—unless it expressly appear upon the will or be necessarily inferred from it, that his intention was confined to pass other estates and interests only, and actually to exclude such reversion therefrom. *Cholmondeley v. Weatherby,* 11 East 332; *Wells v. Scott,* 3 Maule and Selw., 300; *Buckinghamshire v. Downshire,* 2 Bos. & Pul., 600. The true inquiry, then (482) is, whether it be *manifest* on the will that the testator intended to exclude this reversion from the operation of the residuary devise.

We regret that we have not had the benefit of an argument on the part of the plaintiff, and that we are left to discover

as well as we can the views which the Court below took in forming its judgment. We presume that the train of reasoning which led to this result was substantially as follows: The alleged exclusion is not indeed to be found *in words,* but it is to be inferred from an examination of the different parts of the will. In the first place it is to be observed, that the testator, in a prior part of the will, lends to his son William not only the land therein named, but also "all the land not otherwise lent and given; and after this general disposition proceeds expressly to lend to his son, after his wife's death, the land which had been lent to her for life. From this it would seem, that in the devise of all the land not otherwise lent, the testator did not suppose any interest in land included, in regard to which land he had made a previous partial disposition, and therefore deemed it necessary to subjoin an express devise of the land before lent to his wife. And it might have been thought, that having thus ascertained that the testator, in speaking of land not before lent or given, had reference only to the *corpus,* and not the *interest* in it, we ought to understand him when afterwards devising and bequeathing all the property not before lent or given, as confining the disposition to the *things* not before disposed of, and excluding therefrom undisposed interests in those partially disposed of. Besides, this residuary devise is of property not *before* given away or lent; yet immediately afterwards comes a clause making a contingent gift to the children of his son of the land lent to him for life. Now if all the testator's interest in this land, except the life estate devised to William, be included in the residuary devise, this last limitation is repugnant to that devise, and in the construction of every instrument care should be taken to reconcile all its parts to each other.

It is not to be denied that this train of reasoning has much force, and that if it were necessary for the (483) residuary devisees, to establish an actual intent in the testator to pass the reversionary interest, it would be an argument difficult for them to encounter. But as the words of the residuary devise do, in their ordinary, as well as legal import, comprehend this reversion, the argument to be successful should establish a manifest intent in the testator not to include it. This we think it does not show. It does

not follow, that because the testator supposed or apprehended that a devise of *land* not before given or lent did not pass a reversionary interest in the land previously lent, he intended to exclude such an interest from the operation of a devise of *all his property* not before given or lent. It is indeed true, that the word land, unexplained, is sufficient to embrace not only the land itself, but the interest of the testator in it, but it is not so appropriate for that purpose as property or estate. It may well be, therefore, that in using the words "all my property," he might mean all his interest or ownership of every kind in the subjects of property, although in using the word land, he either meant, or feared that others might think that he meant, to pass the thing itself, and not his estate in it, and in the latter case deemed it advisable to subjoin an additional express clause, either to dispose of that estate, or to remove all doubts that it had been disposed of. The residuary devise, and the following clause, ought indeed to be reconciled; but for this purpose, it does not appear to us necessary to give to the residuary devise the restricted construction which this argument requires. The latter clause, may, without violence, be regarded as containing an exception out of, or rather qualifications of the former devise. There is no improbability in supposing that the testator having neglected until the close of his will to provide for the contingency of his son William leaving children, it *then* presented itself to his consideration, and presented itself with the more force, because of his perceiving the effect of the immediately preceding devise, taken in connection with the former dispositions to his son. Courts of justice, in many cases, cannot hope to define with certainty the intentions of testators. It is, safer, when words are found in a will which by usage and legal interpretation embrace certain de- (484) visable interests, and are used without qualification or explanation, to understand the testator as meaning what he says, rather than to indulge in the hopeless pursuit of making out his meaning, by a refined and minute analysis. Things and interests embraced within the disposing words of a will must be taken to pass by them, unless there can be found a declaration plain to the contrary. *Church v. Munday,* 15 Ves., 406. In the present case, it is the more incumbent upon us to adhere to this safe rule, for the departure

from it which the plaintiff insists upon, will have the effect to cause a partial intestacy, when it is apparent from the introductory words of the will, that the testator intended to make a disposition of all "his estate and effects."

The judgment in the Superior Court is to be reversed; and the plaintiff is to have judgment here for one undivided fourth-part of the premises contained in his declaration. The plaintiff is entitled to have his costs of the Court below, and the defendant recovers costs in this Court.

PER CURIAM. Judgment accordingly.

Den ex dem. GEORGE BROOKS v. JOHN ROSS.

An exception, which was intended to bring under review the construction of a deed, cannot be considered, where the terms of the deed are not given in the case stated, nor the deed itself certified as a part of it. And the judgment will be affirmed, although it may not be perceived that it was right, if it do not appear to be wrong.

Ejectment, tried at Stokes, on the last Circuit, before *Saunders, J.*

The case made out by his Honer for the Supreme Court, upon a verdict for the defendant, and an appeal by the plaintiff, stated, that the question was one of boun-
(485) dary, both parties claiming under one Richard Bowman. That the lessor of the plaintiff offered in evidence, a deed from Bowman to one John Perry, under whom he claimed, dated July, 1800, the calls of which were, "beginning at a black oak, thence 143 1-2 poles, to a grub," &c. That the dispute was, as to the second line: that the black oak, the beginning corner, was admitted; and that thence, the course and distance would run so as to cover the land in dispute.

The case further states, that "no evidence being offered to fix any of the corners except the beginning, the lessor of the plaintiff contended he had the right to run according to the calls of his deed." That the defendant offered a deed from Richard Bowman to himself, dated March, 1818, the boundaries of which he contended to be according to certain

corners and lines, which he introduced testimony to establish, and which, he contended, covered the land in dispute. This deed was not made a part of the case, nor were the boundaries of the land, conveyed in it set out in the case.

His Honor charged the jury, that the lessor of the plaintiff would be entitled to hold the lands according to the calls in the deed from Bowman to Perry, unless the defendant had shown a different boundary, and an adverse possession for more than seven years. That whether the land had been run and marked as testified to by the defendant's witness, and whether these were the calls in the defendant's deed, and whether he had held possession adversely for seven years according to these boundaries, were questions for them. Verdict and appeal as stated above.

James T. Morehead, for the plaintiff.
W. A. Graham and *Boyden,* for the defendant.

RUFFIN, Chief Justice: The Court is unable to perceive any error in the record, or indeed, to discover satisfactorily the question it was intended to present.

The case sets out by saying that the question in the cause was one of boundary. It then states the description of the land contained in the deed to the lessor of the plaintiff; and an instruction to the jury that it covered the land (486) in dispute; and that the plaintiff was entitled to a verdict, unless the defendant showed a different boundary with possession according to it. This can be understood only to mean, that the defendant's deed by its descriptive words, must also cover the land claimed and possessed by him. There seems to have been no other point on which the case could have been determined adversely to the plaintiff; and hence we infer that the appeal was intended to bring under review the construction placed on the deed to the defendant. But it is impossible upon this exception to raise that question; for it is not only silent respecting the construction put on it in the Superior Court, but it omits to set out any part of the contents of that deed, except the names of the parties, and the date. The Court cannot declare the meaning of an instrument, of the terms of which we are entirely uninformed. If there was error committed on that point, the

plaintiff must submit to it, as he does not furnish us with the means of correcting it. It is true, that it cannot be seen on this record that the construction and judgment were right. But that is not sufficient: it must appear that they were wrong. Without that document or its contents being in the exception, it cannot be told whether there was error or not; and on that ground the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Stewart v. Garland, 23 N. C., 472; *Brown v. Kyle,* 47 N. C., 443.

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(487)

ALEXANDER GORDON v. VIRGIL M. RAINEY et al.

Where the defendant entered into a penal bond to the plaintiff, with a condition which recited that the plaintiff "had contracted with the defendant to furnish a steam engine, &c , and to put up a saw-mill frame of the best materials, &c , the said defendant to find every thing, erect the furnace and flue, &c., and to have the whole done in a convenient, durable, and workmanlike manner, &c., and to have the whole done" by a certain time, *it was Held*, that the defendant was to furnish the engine and all the materials, and do all the work, and not the furnace and flue only; and that though there might be some ambiguity in the first part of the condition, as to who was to furnish the engine, &c., yet by reading the whole instrument, it was clear that the defendant was bound to furnish all the materials and do everything in discharge of his bond.

Covenant upon the following instrument: "Know all men by these presents, that we, Virgil M. Rainey, William M'Murray and Vincent M'Murray, are held and firmly bound unto Alexander Gordon, agent or president of the Union Steam Mill Company, in the sum of three thousand six hundred dollars, for which payment well and truly to be made, we bind ourselves, our heirs, executors, or administrators, unto him the said Alexander Gordon, his heirs, administrators, executors, assigns, or successors, sealed with our seals and dated this 20 Feb., 1836.

"The conditions of the above obligation are such, that the said Alexander Gordon, agent or president, &c., hath contracted with the said Virgil M. Rainey, to furnish a steam engine, of power sufficient to drive two pair of four feet

stones, with sufficient force to grind well and fast; and also to drive two saws, to saw fast, when the mills are not grinding; and to put up a saw mill frame of the best materials, and framed steady, and the steam engine attached thereto, as well as to the grist mills, and fixed to the grist mills, so as to be easily detached when there shall be water to grind, the said Rainey to find every thing, erect the furnace and flue or chimney, for the smoke to pass from the furnace, and to have the whole done in a convenient, durable and workmanlike manner, for the sum of eighteen hundred dollars; and to have the whole completed by the first day of May next, or June at farthest. Now if the above (488) bounden Virgil M. Rainey shall well and truly have the above-named work done, then the above to be void; otherwise to remain in full force and virtue. Signed and sealed the day and date above-written.

"N. B. If any delay should happen by sickness, or the engine cannot be got to the mill as quick as anticipated, if the saw-mill shall be started by the first of July, it shall be thought sufficient; provided the grist-mills shall be started by the first of May or June."

The plaintiff assigned for breaches, that the said Rainey had not furnished an engine of the power specified; that the said mills did not grind or saw well or fast in consequence of the want of sufficient power in the engine; that the saw-mill frame was of very bad materials, and very badly put up; that the furnace and flue or chimney were so badly constructed, as not to answer the intended purpose; that the whole work was not done in a convenient, durable, and workmanlike manner, but was wholly worthless; and that the mills had not been started for more than twelve months after the time mentioned in the obligation. Pleas, *the general issue, conditions performed.* On the trial at Person, on the last Circuit, before his Honor *Judge Saunders*, after the plaintiff had proved the execution of the bond, and read the conditions of it, his Honor informed the plaintiff's counsel, that he should instruct the jury, that the instrument declared on, the defendant, Rainey, was only bound to erect "the flue or chimney," to find the materials for the same, and to construct it in a workmanlike, convenient, and durable manner, and in the time required by the instrument; and that the

plaintiff was entitled to damages only for his having failed to do so. In submission to this opinion the plaintiff suffered a nonsuit, and appealed.

P. H. Mangum and *Norwood,* for the plaintiff.
W. A. Graham, for the defendant.

DANIEL, Judge: The defendants, as obligors, entered a penal bond of $3,600, to Gordon, the plaintiff, with a condition. The commencement of the condition re-
(489) cites that Gordon had contracted with Rainey, the principal obligor, to furnish a steam engine, &c. Who was to furnish the steam engine, and do the other work mentioned in the condition is the question? We think, it is clearly to be collected, from reading the whole instrument, that it was not Gordon, the obligee in the bond, but that it was Rainey the obligor; and that, too, to exonerate himself from the penalty in which he had bound himself to Gordon in the bond. The subsequent part of the condition recites "Rainey is to find everything," that he is "to have the *whole done* in a convenient, durable, and workmanlike manner for the sum of $1800;" and "to have the whole completed by the first of May." The condition further proceeds as follows: "Now if the above bounden Rainey, shall well and truly have the above named work done, then the obligation to be void." The construction put upon the instrument by the judge, that Rainey was only bound to erect the flue or chimney, we think was entirely too limited. It seems to us that he was bound to furnish every thing necessary, which the entire work mentioned in the condition required to be furnished, and also all the articles required to be furnished; and have the whole work done in a workmanlike manner by the time mentioned in the covenant. This is the plain intention and understanding of the parties, to be collected from reading the whole instrument; and the law requires it to be executed according to the intention, thus ascertained, viz. when the intention and meaning can be fairly arrived at, by reading the whole instrument. Any doubt which might arise as to who was to furnish all the things and do all the work, on reading the first part of the condition, is certainly explain-

ed by reading the residue of it. We think there must be a new trial.

PER CURIAM. Judgment reversed.

(490)

MARTIN WOOLAND v. SAMUEL DEAN.

The act of 1822 (*1 Rev. Stat. c. 58, sec 7.*) for the relief of insolvent debtors, extends only to debts arising *ex contractu*, and not to those incurred for a penalty, or *ex delicto*.

The plaintiff, as overseer of a road, warranted the defendant, one of his hands, for the penalty incurred by the latter, in failing to work on the road, obtained a judgment, and had a *capias ad satisfaciendum* issued thereon. The defendant, upon being taken by the *ca. sa.*, gave a bond for his appearance at the next County Court, and notified the plaintiff of his intention to apply for the benefit of the act of 1822, (1 *Rev. Stat.* c. 58, sec. 7) passed for the relief of insolvent debtors. The plaintiff appeared, and opposed the application, upon the ground that this case did not come within the act. The Court being of that opinion, refused to administer the oath; and the defendant appealed to the Superior Court. At Beaufort, on the last Circuit, his Honor *Judge Dick,* decided that the defendant was entitled to the benefit of the act; and the plaintiff appealed.

Neither of the parties were represented in this Court.

DANIEL, Judge: The debt in this case, for which the plaintiff obtained a judgment, was *incurred* by the defendant as a penalty inflicted by the law, for omitting to do a public duty, viz., working on the road. The legislature did not intend to extend the benefit of the act of 1822 to every description of debtors, who should be arrested under a writ of *capias ad satisfaciendum.* It was intended for the benefit of those who had voluntarily *contracted* or assented to a debt for which they might by law be arrested under a *ca. sa.* Where the judgment on which the *ca. sa.* issues is founded on any "debt *contracted* either by note, bill, bond, open account or otherwise," the defendant in such case shall be entitled to

the benefit of the act. Debts incurred by persons in violating any of the statutes imposing penalties, or debts
(491) upon judgments in causes of action arising *ex delicto,* are not within the provisions of the act of 1822. Only such persons whose indebtedness arose in cases *ex contractu* were intended to be aided by the act. The defendant's case is not embraced either in the words of the act, or in the meaning of the legislature that passed it. We are of the opinion that the judgment must be reversed.

PER CURIAM. Judgment reversed.

EVE FULBRIGHT v. ARCHIBALD TRITT.

Where an original writ is returned "not found," and a term is permitted to elapse without suing out an alias, the suit is discontinued and if, at a subsequent term, an alias is sued, its date is the commencement of the action, and consequently, in an action for slander, if the words were spoken more than six months before its date, the statute of limitation is a bar.

The plaintiff, on 20 Sept., 1834, sued out a writ in case for *slanderous words,* commanding the sheriff to take the "body of Henry Tritt for Archibald Tritt," to answer, &c. At Fall Term, 1834, the sheriff returned the writ "executed on Henry Tritt—A. Tritt not to be found." No process issued from this Term against Archibald Tritt. At Spring Term, 1835, the plaintiff entered a *nol. pros.* as to Henry Tritt, and issued what the clerk instanced as an *alias* writ, but which was in its terms an original writ, against Archibald Tritt, returnable to Fall Term, 1835, and the sheriff returned the same "not found." Then a writ, which the clerk called a *pluries,* but which was in terms an *alias,* issued returnable to the Spring Term, 1836. This was executed; and the defendant appeared and pleaded *the statute of limitations.* The speaking of the words, as charged in the declaration, was within six months of the issuing of the original writ against "Henry Tritt for Archibald Tritt," but not within six months of the date of the first writ issued
(492) against Archibald Tritt, which was on 15 April, 1835. His Honor *Judge Settle,* at Haywood, on the

last Circuit, was of opinion, that the plaintiff's action was barred by the statute of limitations; and a verdict being rendered accordingly, the plaintiff appealed.

Neither party was represented in this Court.

DANIEL, Judge, after stating the case as above, proceeded: We agree with the judge, that the plaintiff's action was barred by the act of limitations. If the original writ had been correctly issued against Archibald Tritt, returnable to Fall Term, 1834, as he was not arrested, the plaintiff should have issued an *alias* from that term. There was not an *alias* issued from that term, and the first suit was *discontinued.* The writ, which issued on the 15th of April, 1835, against Archibald Tritt, must be considered the original in this action. The words were spoken by the defendant more than six months before the 15th April, 1835. We are of opinion that the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Hanna v. Ingram, 53 N. C., 56; *Etheridge v. Woodley,* 83 N. C., 13; *Webster v. Laws,* 86 N. C., 180; *Ditmore v. Goins,* 128 N. C., 329.

ABEL GRIFFIS v. WILLIS SELLARS.

An action for a malicious prosecution cannot be sustained where a verdict and judgment of conviction have been had in a Court of competent jurirdiction, although the party was afterwards acquitted upon an appeal to a superior tribunal.

Case for a malicious prosecution, tried before his Honor *Judge Saunders,* at Orange, on the last Circuit. Plea—Not Guilty.

On the trial the case was, that the defendant had preferred a charge against the plaintiff, and his brother and mother, for mismarking his, the defendant's hogs; (493) that it was found a true bill at the Nov. Sessions, 1833, of Orange County Court; and at the ensuing term the plaintiff and his brother were convicted, and the mother acquitted; that the plaintiff and his brother appealed to the

Superior Court, where they were acquitted. There was much other testimony on both sides, introduced by the defendant to show a probable cause, and on the other a want of it. The case was argued by the defendant's counsel as one for the jury. Authorities were read and commented on to the jury—that in the absence of express malice, the circumstances well justified the defendant in believing the plaintiff guilty of the charge, and the fact that the plaintiff had been found guilty in the County Court ought to satisfy them that the defendant had probable cause for preferring the charge.

"The Court was not called upon to express any opinion "whether the circumstances, if believed, constituted prob- "able cause; and as this was of that class of cases in which "probable cause consists partly of matter of law, and partly "of matter of fact, (29 Eng. Com. Law, 313) the judge "charged the jury, that it was necessary for the plaintiff to "show a prosecution by defendant, and its failure—malice "on the part of the defendant in preferring the charge, and "that it was made without probable cause: that if the plain- "tiff had been guilty, it mattered not as to defendant's motives. "So if defendant, from the circumstances, had grounds hon- "estly to believe plaintiff guilty, although in fact he was in- "nocent, it was a sufficient defence to the action. That if "the defendant had grounds for this belief, then he had prob- "able cause for the prosecution, and the verdict should be "for him. That if the circumstances did not justify this be- "lief, and the jury should think the defendant had been in- "fluenced by malice in making the charge—and malice in its "legal sense was not mere ill-will, but an intentional injury to "another, without just cause or excuse—then their verdict "should be for plaintiff." The counsel for the defendant then requested the Court to instruct the jury, that the fact of the parties living near each other, and the hogs being in the mark of the plaintiff, as had been proved in the (494) course of the trial, justified the defendant in supposing that the hogs had been marked by the plaintiff. "The Court stated to the jury, that these circumstances were "to be considered by them, and whether they justified the "defendant in the belief of the plaintiff's guilt,—it was for "them to collect, after comparing them with the other cir- "cumstances in the case. And the Court, not conceiving

"itself called upon for an opinion as to whether probable "cause had been shown if believed, and no objection being "taken to what was said in reply to the special instruction "prayed for, left the case to the jury." A verdict was returned for the plaintiff; and the defendant appealed.

Devereaux, for the defendant.
W. H. Haywood, and *W. A. Graham, contra.*

RUFFIN, Chief Justice: The innocence of the plaintiff, and a bad motive in the defendant, though necessary, are not the sole or sufficient grounds of this kind of action. It is the interest of the public that there should be a fair investigation in every case of reasonable suspicion; and therefore the law, upon its policy, denies to one really innocent an action against him who promoted the investigation of a case of proper suspicion. Hence, the declaration must allege, that the prosecution was preferred without any just and reasonable, or, as it is commonly said, probable cause; and of that there must be proof from the plaintiff.

Waiving the inquiry, whether the question of probable cause be, from its nature, one of law or one of fact, and admitting that there may be cases in which it is a mixed question, and, as partly partaking of both, may be left to the jury under the advice of the Court, yet it is perfectly certain, that, as legal inferences, presumptions of the want of probable cause, on the one hand, and of its existence, on the other, are held to be established by the judicial acts in the various stages of the prosecution.

Similar inferences from the proceedings likewise remain to some extent, after their determination. It is settled in this state, that a discharge by the examining magis- (495)
trate imports that the accusation was groundless. *Bostick v. Rutherford,* 11 N. C., 83. If the magistrate commit, or if the grand jury find a bill, it has never been doubted that, in law, that is evidence of probable cause, and calls for an answer from the plaintiff as to the particular circumstances; which imposes it on the plaintiff to go into the circumstances, in the first instance. It is true, that in these cases the evidence is deemed *prima facie* only; but nevertheless, it is evidence in that degree, as declared by law,

and the principle is made a part of the law of evidence. After conviction, however, the evidence rises in degree, and is conclusive. This action will not lie under any circumstances, after conviction. Why? Because a competent tribunal has judicially fixed the plaintiff with guilt, and, *a fortiori,* established probable cause for the prosecution.

This proposition is not denied, when the conviction remains in force; but in this case it seems to have been supposed that the judgment of the County Court lost its character of conclusive evidence by the appeal and final acquittal in the Superior Court. Upon authority and reason this Court has arrived at a different conclusion.

Upon looking into adjudications, one is found nearly a century old, and not since questioned, which is directly in point. In *Reynolds v. Kennedy,* 1 Wils., 232, the declaration was for a malicious seizure of brandy, and exhibiting an information before the sub-commissioners of excise, by whom they were condemned; but upon an appeal to higher commissioners, the judgment was reversed and the brandy restored. After verdict for the plaintiff, the judgment was arrested in the Court of King's Bench in Ireland; and upon a writ of error in the King's Bench in England, that judgment was affirmed. The *Chief Justice Lee,* in delivering the unanimous opinion of the Court, said the judgment of the sub-commissioners justified the proceeding before them, and the plaintiff having laid that in his declaration, shows a foundation for the prosecution before the sub-commissioners; so that the declaration was *felo de se.* As that case was on writ of error, these are the necessary consequences:
(496) First, that the inference of probable cause from a conviction by a competent jurisdiction is a legal one, to be made by the Court; and, secondly, that it must be made, notwithstanding a subsequent reversal, and also a verdict to the contrary in the action for malicious prosecution. It cannot be disproved. The Court is not aware that there has been any case on the point in this state. In England, *Reynolds v. Kennedy* has not been questioned, and was relied on as law in *Sutton v. Johnstone,* 1 Term, 493, and in Massachusetts the law is settled in accordance with it. *Whitney v. Peckham,* 15 Mass., 243. Our attention has been called to the case of *Cotton v. James,* 20 Eng. Com. Law, 358, as

being in conflict with the others. But it is not so. That is an action for maliciously suing out a commission of bankruptcy, under which the plaintiff was declared a bankrupt, and which was superseded on the application of the defendant. It has no reference to the principle under consideration. The determination of commissioners of bankruptcy is not of the nature of a judgment. They have a mere authority, without judicial jurisdiction, and act *ex parte;* so that their declaration is not even *prima facie* evidence of bankruptcy for the assignees, who must show by other evidence, an act of bankruptcy to support the commission, and their assignment under it. *Rex v. Glamorganshire,* 1 Lord Ray. Rep., 580; *Graenvelt v. Burwell, Ibid.,* 467.

But without the aid of an adjudication, the doctrine carries conviction along with it, especially in reference to a judgment founded on the verdict of a jury. It is to be recollected that the subject of inquiry in such a case is, whether there was probable cause for the prosecution. What is probable cause? It is constituted by such facts and circumstances as, when communicated to the generality of men of ordinary and impartial minds, are sufficient to raise in them a belief, or real grave suspicion of the guilt of the person. Now, what more satisfactory criterion can there be, by which to determine what influence those facts and circumstances might or ought to have had on the mind of the prosecutor, than that which is certainly seen they have had on the minds of the twelve upright men, chosen for their (497) indifferency for the parties? We do not desire to be considered as laying it down that a verdict if set aside by the Court in which the trial was had, would establish probable cause. Probably that may stand on different reasons; but if so, we have no concern with it at present. A verdict and judgment of acquittal, certainly do not imply a want of probable cause; because such a verdict may be given, notwithstanding strong suspicion, because there is not full proof of guilt. But after a conviction by verdict, followed by sentence, it ceases to be a matter of conjecture, or argument, and of reasoning, whether guilt could rationally be inferred from the facts admitted or proved; for such a state of things cannot occur, but after full defence by the accused, with deliberation by the jury, aided by the Court, upon all the evi-

dence as well explanatory as negative, offered by the accused; and, after all that, guilt was in fact inferred by a numerous body of men of competent understanding and integrity, and the Court was also satisfied with it. As evidence of probable cause a conviction by verdict and judgment is as convincing, and, therefore, ought in law to be as high and conclusive, although vacated by appeal, as if it stood unreversed and in full force. It sanctions the prosecution in its origin and progress through that Court, and is the highest evidence, namely a judicial sentence of record, that apparently the accused was guilty. It is true that the law, in its benignity, allows the convict to show, on appeal to another Court, that he is really not guilty. But that does not show, nor can it be shown, against the facts of the first verdict and judgment, that there was no just and probable cause of accusation.

The verdict in this case, therefore, ought not, we think, to stand; as it appears affirmatively in the case stated to be against law. It was erroneous, in our opinion, to submit the case to the jury on any circumstances *dehors* the record, without or with an opinion from the Court, that those circumstances did or did not constitute probable cause. The plaintiff stated his conviction in the County Court in his declaration, or at least, it appeared in the record (498) which he was obliged to read. Then the plaintiff's own pleadings, or evidence, contained proof of probable cause, and was destructive of his case. To use the words of *Chief Justice Lee,* the plaintiff's case was *felo de se;* and there was nothing to submit to the jury. The judgment must be reversed, and a *venire de novo* ordered.

PER CURIAM. Judgment reversed.

Cited: Price v. Stanley, 128 N. C., 40; *Jones v. Railroad,* 131 N. C., 137.

JACOB BOYCE v. WILLIAM C. WARREN.

Where the guardian of a lunatic under an order for the sale of the lunatic's property, became the purchaser of a slave, and upon the lunatic's becoming of sound mind, settled with him and obtained a receipt for "all demands," and afterwards retained possession of the slave for more than three years; it was *Held*, that although the purchase gave the guardian no title, the settlement and receipt were evidence of a demand for the slave, and that the subsequent possession was adverse, and barred the action of the lunatic.

This was an action of detinue, for a slave. Pleas, *non detinet,* and *the statute of limitations.*

Upon the trial at Chowan, on the last Circuit, before his Honor *Judge Pearson,* it appeared that the slave had once belonged to the plaintiff, who, by an inquisition, dated 3 June, 1818, had been found a lunatic, and to whom Henry Skinner had been duly appointed committee. At October term, 1818, of Chowan Superior Court, Skinner filed a petition for a sale of some of the slaves of the plaintiff for the purpose of paying his debts and providing for his maintenance. The Court made an order *nisi* to sell any one of the slaves mentioned in the petition, for cash, and directed twenty days notice to the next of kin, to show cause at the next term why it should not be made absolute. Skinner exposed the slave in dispute to sale, without having given the notice to the next of kin, or having the order made absolute, and became the purchaser himself for the sum of two hundred and fifty dollars, which was a fair price with which he charged himself, in his accounts. Afterwards the (499) plaintiff became of sound mind, upon which Skinner delivered over all the property remaining in his hands belonging to the plaintiff, except this slave, and the plaintiff thereupon gave him the following receipt: "Rec'd this 1 August, 1822, from Henry Skinner, twenty-five dollars in full of all demands that I have against him as my guardian. Rec'd by me, JACOB BOYCE." The plaintiff managed his estate afterwards himself, and was always capable of doing so. Skinner continued in possession of the slave without further claim from the plaintiff, until his death in the year 1836, when his executors hired him to the defendant. The

inquisition found was never reversed, nor was the order appointing Skinner guardian ever revoked or set aside.

His Honor charged the jury that the sale by Skinner to himself was void; and that his possession afterwards was not adverse, so as to give him a title to the slave. There was a verdict for the plaintiff, and the defendant appealed.

Devereux, for the defendant.
Iredell, contra.

DANIEL, Judge, after stating the case as above, proceeded: Skinner, under his alleged purchase from himself, acquired no title to the slave; and the charge of the Court that the sale was void was undoubtedly correct. But it appears that afterwards, the plaintiff became of sound mind, and in the year 1822, came to a settlement with Skinner, received his property, and gave a receipt in full to Skinner, as his guardian. Skinner had paid a fair price for the slave, and the plaintiff had received the benefit of the purchase money. Skinner under these circumstances, retained the possession of the slave as his own property, up to his death, in the year 1836, when his executors took possession and hired the slave to the defendant, as the property of their testator. When the plaintiff came of sound mind in 1822, he had a right to make the settlement with his committee, although the inquisition had not been reversed by any order of Court. After this settlement, Skinner's character as trustee ceased. His
(500) retaining the possession of the slave as his own property from that time up to the year 1837, when the writ was issued, seems to us to be a possession sufficiently adverse, for the statute of limitations to operate upon it. The receipt given by the plaintiff is evidence that he had demanded all the property that was due him. Skinner's afterwards holding the possession of the slave as his own property, gave the plaintiff a right of action, and the act of limitations began to run cotemporaneously with the accrual of the plaintiff's right of action. We are of opinion that there must be a new trial.

PER CURIAM. Judgment reversed.

HENRY MILLER, Chairman, on the relation of UZZEL LASSITER et Uxor v. JOHN WILLIAMS.

In a bequest of personal property to B. R. and if he "dies leaving no heir lawfully begotten of his body," then over, the limitation is not too remote, but is good as an executory devise.

Debt, upon the bond given by the defendant as administrator of Benjamin Reddick, deceased. Pleas, performance, and *non infregit conventionem.* At Greene on the last Circuit, a case agreed, of which the following are the material facts, was submitted to *Dick, J.* John Reddick died in the year 1820, and by his will gave to his son Benjamin Reddick, both real and personal property. The testator then subjoined the following clauses: "If Benjamin Reddick dies, leaving no heir lawfully begotten of his body, I give all my property, real and perishable property, to my wife Martha, her natural life." "If Benjamin Reddick dies and leaves no heir, or dies before he is old enough to receive his property, and after my wife Martha Reddick's death, the perishable property to be equally divided between William Williams" and others. Benjamin Reddick died under the age of twenty-one years, and without issue, in the lifetime (501) of his mother, Martha Reddick. The relator's wife is a sister of the half blood of Benjamin Reddick. The relators contended that the limitation of the property to the widow, and to William Williams and others, in the aforementioned clauses of the will of John Reddick, was upon a contingency too remote to make it a good executory devise: that the whole personal property was absolutely vested in Benjamin Reddick, and that they were entitled as next of kin to recover of the administrator their share of it. His Honor, *pro forma,* gave judgment for the defendant, and the relators appealed.

Badger, for the relators.
Devereux and *J. H. Bryan,* for the defendant.

DANIEL, Judge, after stating the case proceeded: The question submitted for the decision of this Court is, whether the perishable property which Benjamin Reddick, the intes-

tate, received under the will of his father John Reddick, belonged to him absolutely, so as on his death, it should go to his next of kin; or whether, on his death without issue, it should go over to his mother for life by virtue of his father's will. The judge below was of opinion that on the event which happened, viz., Benjamin dying and leaving no issue in the lifetime of his mother, the property in dispute went to the widow of John Reddick for life, by force of the executory devise in his last will. The plaintiffs have appealed from this decision.

Ever since the case of *Forth v. Chapman,* 1 Peere Williams, 663, the principle has been considered as well settled, both in England and this country, that in a bequest of personal property to a legatee, and if he dies "leaving no issue," or dies "leaving no heir," then the property to go over to another, the limitation over is not too remote, but is good as an executory devise. The word "leaving," confines the time of the vesting of the property in the executory devisee, to the period of the death of the first taker. *Vide Jones v. Spaight,* 4 N. C., 157. We are of the opinion that the limi-
(502) tation over by the will of John Reddick of the personal property, which is the subject of this suit, is in law good; and that the relators, as next of kin of the intestate, Benjamin Reddick, are not entitled to any share of it. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

MICHAEL GARMON v. DANIEL BARRINGER.

In an original attachment, any defect in the affidavit is waived by appearance and pleading in chief.

The cases of *Powell v. Hampton.* 1 N. C. 306; *McCulloch v. Tyson,* 9 N. C., 336, and *Lavender v. Pritchard,* 3 N. C. 337, approved.

This was an action of assumpsit, instituted in the County Court of Cabarrus, by original attachment. The plaintiff gave the usual bond for prosecution, in which he was joined by one Miller, as his surety. The writ stated the oath of the plaintiff, that the defendant was an inhabitant of another

state. But the affidavit returned set forth only the amount of the debt. The defendant replevied the estate attached, and pleaded *non assumpsit;* on which issue was joined, a trial had, and a verdict and judgment given for the plaintiff; from which the defendant appealed to the Superior Court.

On the last Circuit, before his Honor *Judge Toomer,* the defendant moved to quash the writ, for the defect in the affidavit; which was refused.

Upon the trial of the issue, the plaintiff wishing to use as a witness a person who was the administrator and one of the next of kin of Miller, the surety moved for leave to give another bond, with other sureties, and to have the first cancelled. To this the defendant objected, that the Court had no power to change the bonds, or discharge the first surety. But His Honor allowed the motion; and the witness was examined; and a verdict being returned for the (503) plaintiff, the defendant appealed.

No counsel appeared for the defendant.
D. F. Caldwell, for the plaintiff.

RUFFIN, Chief Justice, having stated the case as above, proceeded as follows: In the opinion of this Court, there is no error on either of the points made in the exceptions.

The failure of the plaintiff to entitle himself to the particular writ, by making an affidavit to the foreign residence of the defendant, cannot be taken advantage of now, according to the rule, that objections to the process are waived by a plea in bar. Besides that, the 26th section of the act of 1777 (1 *Rev. Stat.* c. 6, sec. 3) provides particularly, that if an attachment be issued without bond and affidavit taken and returned, as mentioned in the previous section, "it *shall* be abated on the plea of the defendant." The fourth resolution in *Powell v. Hampton,* 1 N. C., 306, is, that the matter must be put on the record by plea, and cannot avail on a writ of error, where the judgment was by default. Without reconsidering that point, we think that the statute must, at the least, mean, that where the defendant does appear, the defect may and must be pleaded in abatement according to the general principles of pleading; and, consequently, the defect is cured by the plea in bar.

Upon the other point, the case of *M'Culloch v. Tyson,* 9 N. C., 336, and the previous one of *Lavender v. Pritchard,* 3 N. C., 337, authorize the acts of the Court. Those were cases of appeal bonds, on which the judgment may be summary: and yet they were cancelled, and others substituted to let in a witness. The purpose of the statutes is to secure the opposite party. If that be done, there is no reason, founded in justice, why a witness may not be made competent in this manner.

PER CURIAM. Judgment affirmed.

Cited: Leak v. Moorman, 61 N. C., 169.

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(504)

JAMES MARTIN et al. Ex'rs v. JAMES F. HARBIN.

The possession of a slave by a donee under a parol gift made since the act of 1806, (*1 Rev. Stat., c. 37, sec. 17,*) is that of a bailee, and no length of such possession will bar the title of the donor, but if he demand possession, and the donee refuses to deliver up the slave, claiming him as his own, his possession then becomes adverse to the donor, and after three years will bar his action.

This was an action of Detinue, to recover a slave, by the name of Harvey. Pleas, *non detinet* and *the statute of limitations.*

On the trial at Wilkes, on the last Circuit, before *Toomer, Judge,* it appeared, that the defendant had married a daughted of Thomas Fletcher, the plaintiff's testator, who owned the slave in question, and in September, 1828, had sent him to the defendant, in whose possession he remained until the bringing of this action. The defendant's wife having died, her father, by letter, on 14 March, 1829, demanded the slave of the defendant, who refused to deliver him up, saying that the slave belonged to him. Fletcher, afterwards, on the first of April, of the same year, again wrote to the defendant demanding the slave, and sent an agent to receive him, and threatened to bring an action in case of a refusal. The defendant again refused to deliver up the slave, and retained him claiming him as his own. Fletcher died in the year 1835, and the plaintiffs, as his executors, after a demand

and refusal, brought this action in the month of October, 1836.

His Honor charged the jury, that the original possession of the slave by the defendant, was but a bailment, and transferred no title: that the bailment was revocable at the will of the bailor: that if the plaintiff's testator demanded the slave at the times mentioned in the two letters produced in evidence, and the defendant refused to surrender him, and claimed him as his own, and that refusal to surrender, and claim of title by the defendant was made known to the bailor, then the bailment was at an end, and the bailee became a wrong-doer. His possession immediately (505) came adverse to that of the bailor, to whom a cause of action then accrued; and if this adverse possession was continued by the defendant for more than three years, then the plea of the statute of limitatons was supported and the suit was barred. The jury found a verdict for the defendant, and the plaintiffs appealed.

Devereaux, for the plaintiffs.
D. F. Caldwell, for the defendants.

DANIEL, Judge, after stating the case as above, proceeded: We have examined this case, and are unable to discover any error in the charge of the Court to the jury. It is a case completely within the principle decided by this Court in *Powell v. Powell,* 21 N. C., 379. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Green v. Harris, 25 N. C., 220; *Baxter v. Henson,* 35 N. C., 460; *Weeks v. Weeks,* 40 N. C., 117; *Koonce v. Perry,* 53 N. C., 60.

JOHN COPELAND v. PETER ISLAY.

A constable cannot, under a warrant, nor by virtue of his office, make an arrest out of his own county, although under a reasonable belief that a felony has been committed, and that the person arrested was the felon.

This was an action of Trespass *vi et Armis,* for false imprisonment, tried at Guilford, on the last Circuit, before *Saunders, Judge.* Pleas not guilty and a special justification under process. It appeared upon the trial, that the store house of one Jedediah Smith, in the county of Guilford, had been broken open, and money and other articles of value taken therefrom; that Smith had gone before a magistrate, and upon oath charged the plaintiff and one Conrad Sheppard, his father-in-law, with the offence: that the defendant was present and heard the oath of Smith: that a warrant against the plaintiff and his father-in-law was delivered to the defendant, who was a constable in the county of Guilford: that the defendant went with his warrant to the house of Sheppard, with whom the plaintiff was (506) then living: that Sheppard was at home, and was arrested, but the plaintiff not being there, the defendant went in pursuit of him, and found him in the county of Orange, engaged in his ordinary business, and there arrested him: that the plaintiff, on being told the charge against him, expressed his willingness to go, but the defendant said he felt it his duty to *confine him;* and did in fact tie his arms behind his back, and carried him thus confined before the magistrate in Guilford county, where he was untied and put under guard. For the plaintiff it was contended, that whatever authority the warrant might give the defendant to arrest in the county of Guilford, it gave none to arrest in the county of Orange; and that at all events the plaintiff was entitled to recover damages for the excess of authority in tying him when there was no necessity for so doing: and the plaintiff's counsel moved the judge so to charge the jury. But His Honor charged them that a constable had the right to arrest on reasonable grounds for believing that a felony had been committed; and that it was

his duty to arrest, when informed of that fact: that "if the jury were satisfied of the felony, and that the defendant, a constable, was present, and heard the oath of Smith charging the plaintiff, it was such information as justified him in arresting the plaintiff, with or without a warrant." That as to the excess complained of in the defendant's having tied the plaintiff, that question did not arise under the pleadings, as the plaintiff had replied generally to the defendant's plea of justification. There was a verdict and judgment for the defendant; and the plaintiff appealed.

J. T. Morehead, for the plaintiff.
W. A. Graham, for the defendant.

DANIEL, Judge: The plaintiff prayed the judge to charge the jury, that whatever authority the state's warrant might give the constable, the defendant, to arrest in the county of Guilford, he had no authority to arrest in the county of Orange. The Court did not charge as prayed, but told the jury, that a constable has the right to arrest on reasonable grounds for believing that a felony had been committed, and that the person arrested was the (507) felon, either with or without a warrant. The judge's charge is certainly law, as far as it goes. If a constable or other officer has reasonable grounds for believing that a party charged was guilty of felony, though he turn out to be innocent, and although no felony whatever has been committed, the officer is justified in arresting. *Davis v. Russell,* 15 Eng. Com. Law, 463. *Fox v. Gaunt,* 3 Barn. & Adol., 798. *Beckwith v. Philley,* 6 Barn. & Cress., 635. But the charge was not co-extensive with, nor in answer to the prayer of the plaintiff. So far as the charge went, the plaintiff had admitted in the preliminary part of his prayer, if the act were done in Guilford; but that to which he wished a categorical answer, viz., was the defendant, *as constable,* armed with the warrant, authorized to arrest out of his own county? This part of the prayer was not answered by the judge. Or, if it can be collected from the case to be answered, it was the opinion of the judge, that the defendant, being a constable of Guilford, might, either by virtue of his warrant, or *ex officio,* arrest in Orange. The law is, that an officer must pro-

ceed to arrest at some place actually in his own county; 1 H. Black., 15 n; 1 Lord Ray, 736; for if the arrest should be made in fact out of the proper county, an action of trespass for the imprisonment might be sustained. 3 Chitty's Gen. Prac., 354. The legislature has authorized constables to arrest on bays, rivers or creeks, adjoining their counties, and return the precepts to a justice of their own county. (1 *Rev. Stat.* c. 24, sec. 9.)

The defendant's counsel in this Court now contends, that a *felony* had actually been committed by some one in breaking Smith's store-house, and stealing money therefrom: that the defendant had *reasonable grounds* to believe it was the plaintiff, as he was present when Smith made his affidavit and charged the plaintiff with the *felony;* and that he was justified in arresting him anywhere, in his character of a *private citizen;* and as he did arrest the plaintiff in Orange, under a reasonable belief that he was the felon, he had a right to carry him before a magistrate of the neigh-
(508) boring county of Guilford, to be examined—the evidence being there. The answer we make to this argument is, that admitting a private person may arrest, where a *felony* has in *fact* been committed, on *reasonable grounds* of belief, that the person arrested is the felon, (1 Chitty's Gen. Prac., 620, 15 Eng. Com. Law, 463,) still that did not seem to be the question decided by the judge, or the point controverted in the Superior Court. The case seemed to rest on the question, whether the defendant, being a Guilford constable, had a right to arrest the plaintiff in Orange, either by force of the warrant, or by virtue of his office, under a *reasonable belief* that a felony had been committed, and that the plaintiff was the felon. Upon that point (as we understand the case, which is badly made up,) we are of opinion the judge was mistaken as to the law. We therefore think it is but right, that the case should be again submitted to a jury. It will be understood that we give no opinion whether the defendant has made out, or can make out, a valid justification for the trespass imputed to him in his character of a citizen. There must be a new trial.

PER CURIAM. Judgment reversed.

EDWARD HOBBS et Uxor v. WILLIAM BUSH.

Upon a motion to be admitted a party to a suit under the act of 1798 (*1 Rev. Stat., c. 2, sec. 4,*) suggesting that the person moving had married the *feme sole* plaintiff, any objections to the validity of the marriage must be then made, or on an application afterwards made for rescinding the order of admission as having been improvidently made. But while such order remains in force, no evidence can be received on the trial of the cause upon the issues, for the purpose of impeaching the validity of the marriage.

This was an action of Detinue for several slaves, instituted September, 1834, in the name of Mary Taylor, a woman of *non sane* memory, by her guardian and committee. Plea, *non detinet,* and issue thereon. Pending the suit, Edward Hobbs, in 1835, intermarried with the (509) *feme* plaintiff, and at the next term was, on his motion, permitted to give a prosecution bond, and admitted a party of record, as husband of the original plaintiff, with leave to prosecute the suit.

On the trial at Gates, on the last Circuit, before *Pearson,* Judge, it was not disputed that the slaves had belonged to Mary Taylor; and the defendant claimed title by a bill of sale, executed by her in 1833. The plaintiffs insisted that the conveyance was void, by reason of her mental incapacity at that time; and offered in evidence the testimony of witnesses to that effect; and also an inquisition taken in July, 1834, in which it was found that for ten years preceding she had been *non compos,* and incapable of making a contract. The defendant then offered in evidence, the testimony of the same witnesses, given upon cross-examination, that Mary Taylor was then about fifty years of age, and had been from her birth an idiot.

The defendant thereupon insisted that if the evidence on the part of the plaintiffs was sufficient to establish the incapacity of Mary Taylor to make the contract of sale in 1833, it was also to be inferred from it that she was incapable of contracting marriage in 1835; and moved that the plaintiffs should be non-suited. But the Court refused the motion.

The defendant further insisted, that if, upon the whole of the evidence, the jury should be of opinion that the incapacity of Mary Taylor existed both at the time of the sale, and

at the time of the marriage, then the marriage was void as well as the sale, and the verdict ought to be in favor of the defendant; and he prayed the Court so to instruct the jury. But the Court also refused to give the instructions as asked; and the defendant excepted on both grounds, and after a verdict and judgment for the plaintiffs, he appealed.

Iredell and *Heath,* for the plaintiffs.
Devereux, for the defendant.

RUFFIN, C. J., after stating the case as above, pro-
(510) ceeded as follows: The substance of each exception is that the existence and validity of the marriage was involved in the issue made between the parties. It does not seem material, therefore, to advert to the different modes in which the question was presented; for if, as is the opinion of the Court, the defendant cannot upon trial of that issue, disprove the marriage, it follows that the proof of it is not incumbent on the other side; and that a nonsuit could not be ordered for the want of such proof.

Until our act of 1798 (*Rev. Stat.* c. 2, sec. 4,) if a marriage took place *pendente lite,* the husband could not become a party; but the action might be abated therefor upon plea of the defendant, since the last continuance; or, if that matter was not pleaded, the suit proceeded in the name of the *feme,* as if she were still sole. *Lee v. Maddox,* Leon., 168. *Morgan v. Paynter,* 6 T. R., 265. Coverture of the plaintiff cannot at common law, be pleaded in bar, but in abatement only. *Milner v. Milner,* 3 T. R., 627. Of the same nature, in an action brought originally by husband and wife, is the defence that they are not husband and wife; either because they were never married, or that the marriage was void. In *Dickerson et Uxor v. Davis,* 1 Strange, 480, on not guilty in trespass for assault on the wife, the defendant would have given in evidence, that the man had a former wife still living, insisting that the plea did not go barely to say that the defendant did not beat the woman, but that he did not beat the man's wife; so that he was not entitled to damages. But the evidence was rejected, the *Chief Justice Pratt* saying, that it might have been pleaded in abatement, and unless so pleaded, the honestest couple might be surprised and brand-

ed for adultery. Mr. *Justice Buller* lays it down in general terms, that in all actions by *baron* and *feme,* unless the marriage be specially denied by plea, it is admitted. Bull. N. P., 20. It seems, then, to be settled law, that in suits brought by husband and wife, the marriage is not involved in the general issue, and can be questioned only by putting it directly in issue.

The act of 1798 alters the common law, and prevents an abatement upon marriage, at least if the husband makes himself party at the next term. The inquiry (511) is, how the invalidity of the marriage, which has in fact been celebrated, is to be raised and determined in such a case. It certainly cannot be pleaded in abatement of the action brought by the feme while sole; for it would be absurd to abate her suit upon the allegation that she was not married. But it does not follow, that the general issue shall involve the question more in this case, than it would if the action had been brought at first by husband and wife. The period of determining the character of the person must be when he applies to become a party; and the mode, by the Court, by whose leave he is admitted. He cannot be admitted till he shows the marriage; for his only title to admission depends on that fact, and the order for his admission states him to be the husband. The invalidity of the marriage cannot therefore be urged as an objection to his prosecuting the suit to which he has been made a party, as husband; but ought to have been brought forward as an objection to his being made a party at all. The statute provides, that the husband may be made a party "on motion;" and that "the suit shall afterwards be carried on as if he and his wife had been originally plaintiffs." It is analogous to an application to carry on a suit in a representative character. Although the evidence of the character assumed may be more simple and direct in the one case than the other, the legal principle is the same. When one is brought in under a *scire facias* as the executor of a deceased defendant, whether he can make any other defence or not, there is no doubt that he can deny that character by plea. But when a plaintiff dies, his executor is made a party on motion, and without process, and is entitled to a trial *instanter,* or at the next term, at his election; and because, by construction of the statutes this is

done on motion, the admission of record is deemed a definitive adjudication of the representative character. *Anonymous,* 2 N. C., 455. *Anonymous* 3 N. C., 66. *Regula Generalis,* stated by *Judge Taylor,* 1 N. C., 88. The person applying must satisfy the Court that he is executor, and unless admitted by the opposite party must produce his letters testamentary. The admission of record implies either
(512) that the defendant did not insist on the production of the letters, or that they were exhibited. Hence after the order is once made, it is too late to contest the fact of his being executor. This was determined on a writ of error, in *Wilson v. Codman,* 3 Cranch, 193; the provisions of the act of Congress being similar to our own for reviving of actions. The same view was taken by this Court of the effect of an order of reviver in equity, in *Macnair v. Ragland,* 16 N. C., 533; it being deemed conclusive of the representative character, and to dispense with the proof of it on the hearing of the revived suit. Those conclusions have resulted necessarily from the interpretation which made the statutes require a decision *on motion.* The same consequence must be yet more necessary on the act of 1798, which uses those very words. As the party applies by motion, and no process and no plea are given, and no delay of trial provided for, but the suit is to proceed as if the action had been brought by husband and wife, the character of the applicant, whether husband or not, is involved in the application, and is decided in granting the motion. It might have been contested at the time; or, on a proper application, afterwards, the Court might have amended by rescinding the former order, if improvidently made. But while it stands, it is definitive of the existence of a legal marriage; and evidence to the contrary on the trial, would be liable to the objection, that it was contradictory to the record itself. Reviewing the judgment as a Court of error, it is not competent, in the present state of the case, to this Court, to pass on the propriety of the original order of admission, nor of any that might, on proper grounds, have been made to correct it. On the trial the question made by the defendant was not open; and therefore the refusal of the instruction prayed was not erroneous, but proper.

PER CURIAM. Judgment affirmed.

(513)

RICHARD H. ALEXANDER, Assignee, v. ALEXANDER OAKS.

A bond for the payment of a certain sum in "bank stock, or lawful money of the United States," is not negotiable under the act of 1786 (*1 Rev. Stat., c. 13, sec. 3,*) so as to enable the assignee to sue in his own name.

This was an action of Debt, brought by the plaintiff as assignee, against the maker and endorser of the following sealed instrument, to wit:

"1400. Thirty days after date, I promise to pay, William W. Long, or order, the sum of fourteen hundred dollars, in bank stock, or lawful money of the United States, for value received, this 4 November, 1831.

"A. OAKS. [L. S.]"

On the instrument was the following endorsement, viz.:

"I assign the within, to R. H. Alexander, trustee, 24 November, 1834.

"W. W. LONG."

Upon the trial at Rowan, on the last Circuit, His Honor *Judge Toomer* was of opinion, that the instrument declared on was not negotiable, so as to enable the assignee to sustain an action in his own name; whereupon he submitted to a non-suit and appealed.

Badger and *Boyden,* for the plaintiff.
D. F. Caldwell, for the defendant.

DANIEL, Judge: The only question submitted for our decision in this case is, whether the single bill or bond declared on is negotiable, so as to enable the plaintiff as assignee to sue in his own name. The bond is drawn for fourteen hundred dollars, payable "in bank stock or lawful money of the United States." By the act of 1762, (1 *Rev. Stat.* c. 13, sec. 1,) promissory notes drawn for the payment of money, were made negotiable and assignable over, in like manner as inland bills of exchange are by the custom of merchants in England; and the person to whom the same is assigned, may maintain an action on the same, as in cases of

inland bills of exchange. The legislature, in the
(514) year 1786, (1 *Rev. Stat.* c. 13, sec. 3,) enacted, "that all bills, bonds, or notes, for *money,* as well those with, as those without seal, shall be held and deemed to be negotiable, and all interest and property therein, shall be transferrable by endorsement, in the same manner, and under the same rules, as notes called promissory, or negotiable notes, have heretofore been; and the endorsee, in his own name, may have and maintain his action, &c., as endorsees of notes, called promissory or negotiable notes." Thus, it seems, that notes and bonds to be negotiable under the aforesaid acts, must stand upon the same footing, and be governed by the same rules, as inland bills of exchange are by the law merchant. Bills of exchange to be negotiable by the law merchant, must be drawn for the payment of money absolutely, and not for the payment of money and performance of some other act, or in the alternative. Chitty on Bills, 45. A written promise to pay three hundred pounds to B., or order, in three good East India bonds, was held not to be negotiable within the statute of Ann. Buller's N. P., 272. If a bill is not negotiable upon its face when drawn, it cannot afterwards become so by circumstances arising *ex post facto.* Bayley on Bills, 9. *Kingston v. Long,* Chitty on Bills, 42, note. *Hill v. Holford,* 2 Bos. & Pul., 413. In the case before the Court, the bond is not for the payment of money absolutely: the obligor had his election, before or at the day of payment, to discharge it by transferring fourteen hundred dollars' worth of bank stock to the obligee. In New York the Courts have gone the length of holding, that a note, payable in bank notes, current in the city of New York, is a negotiable note within the statute. Bank paper, in conformity with common usage and understanding, is (say they) regarded as cash; and, therefore, that the note meant the same as if payable in lawful current money of the state. *Keith v. Jones,* 9 Johns., 120. *Judah v. Harris,* 19 Johns., 144. But in the states of Massachusetts and Pennsylvania, it has been held that notes or bills payable in the notes of their chartered banks are not negotiable, and the endorsees cannot sue in their own names. *Jones v. Fales,*
4 Mass., 245. *McCormick v. Trotter,* 10 Serg.
(515) & Rawle, 94. But bank stock has in no state ever

been considered or regarded as cash; the instrument is, therefore, not negotiable according to the authorities before cited. We are of the opinion that the judgment rendered in the Superior Court was correct; and the same is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Knight v. R. R., 46 N. C., 359; *Johnson v. Henderson,* 76 N. C., 229.

Den ex dem. EDWIN C. DANCY et al. v. REDDING SUGG.

1. A claim to land without possession, does not raise the presumption of a grant. It is also incompetent to show a mistake in the description of a deed. In both cases, it is nothing more than the party's own declaration, which, unsustained by accompanying acts, is not evidence for him, nor for any person setting up a derivative title under him.

2. Hearsay evidence as to boundary *post litem motam* is inadmissible.

Ejectment, tried at Edgecombe, on the last Circuit, before *Nash, Judge.*

On the trial, the only question was, whether a certain line of the defendant's land should run from an admitted point, north 85 deg. east, or south 85 deg. east. The defendant's deeds called for the latter course; and it was admitted that he, and those under whom he claimed, had had possession up to the line so run, for forty years; but between that and a line run north 85 deg. east, he, and those from whom he derived title, never had actual possession. The defendant alleged that there had been a mistake in drawing the deeds which he produced in support of his title; that instead of the disputed line running "south 85 deg. east," it ought to have been written "north 85 deg. east;" and in order to show this, he offered to prove that those under whom he derived title had always claimed to the line running "north 85 deg. east;" and contended, that if it was not evidence to show the mistake, such claim when continued for forty years, was evidence from which the jury might presume a grant

for the land up to the line claimed. But this testi-
(516) mony was rejected by the Court. The defendant then offered to prove by a witness, that two old men, then dead, had shown him the line running north 85 deg. east, as the dividing line between the land of the lessors of the plaintiff, and the defendant; but it appearing that the defendant had taken the two old men, together with the witness, to the line, after the contest had arisen between the parties as to the line, the Court excluded the tstimony. The jury returned a verdict for the plaintiff; and the defendant appealed.

The Attorney-General and *Badger,* for the defendant.
Iredell and *B. F. Moore,* for the plaintiff's lessors.

RUFFIN, Chief Justice: The heresay from the two deceased persons, being *post litem motam,* was inadmissible evidence.

The claim of a line different from that of the deeds under which the claimants derived title, is likewise incompetent for either of the purposes for which it was offered. A claim merely, without possession, is nothing more than the declaration of the party himself. It cannot found the presumption of a grant for the land beyond the lines described in the deed; for there can be no such presumption, where there is no possession. Nor in like circumstances does such a claim, or rather declaration, tend in the least to establish a mistake in the description contained in the deed. The party's own declaration, unsustained by accompanying acts, is not evidence for himself; nor can it be offered by those who set up a derivative title under that party. There being no possession beyond the deed is conclusive on both points. The declaration, by itself, tends to establish nothing. In *Jones v. Huggins,* 12 N. C., 223, an ancient survey was rejected, though urged not to be the act of the party, but of the surveyor who was then dead.

The exceptions being confined to the question of evidence, in which no error exists, the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: State v. Johnson, 60 N. C., 152; *Mason v. Mc-*

Cormick, 85 N. C., 228; *Bethea v. Byrd,* 95 N. C., 311; *Dobson v. Whissenhunt,* 101 N. C., 648.

(517)

WILLIAM MASTIN, Administrator of JEFFERSON MASTIN, v. WILLIAM P. WAUGH.

1. If, upon the pleas of *non assumpsit* and *the statute of limitations,* the jury find both the issues in favour of the defendant, it will be unnecessary to consider the propriety of the instructions given in relation to the latter plea.

2. In order to repel the statute of limitations, there must either be an express promise to pay, or an explicit acknowledgment of a subsisting debt.

Assumpsit, brought by the plaintiff to recover compensation for the services of his intestate, as a clerk in the store of Benjamin J. Parks & Co., of which firm the defendant was a member. The services were rendered from 1 Nov., 1822, till 20 Oct., 1825; and the account produced on the trial by the plaintiff exhibited a claim to compensation for that period. Pleas, "The general issue and the statute of limitations;" and upon the issues joined on these pleas the case was tried at Wilkes on the last Circuit, before His Honor *Judge Toomer.*

The suit was commenced in 1836; and it was admitted by the plaintiff, that the statute was a bar, unless there had been a subsequent promise or acknowledgement to take the case out of it. For this purpose he relied upon certain circumstances which had occurred between the defendant and himself in the winter of 1834 or 1835. At that time there was an attempt to settle the partnership accounts of Benjamin J. Parks & Co. before an arbitrator, and the plaintiff and defendant were both present; the plaintiff attending as administrator of Asbrose Parks, one of the partners. On that occasion the plaintiff, as adminstrator of Jefferson Mastin, brought forward the present claim; upon which, the witness stated, "many warm words passed between plaintiff and defendant, in relation to it, and much excitement was exhibited by them; but no admission was made of it, either by the de-

fendant, or Benjamin J. Parks," another partner then present. The defendant, on his part, then introduced an account in the handwriting of the intestate, Jefferson Mastin, charging the defendant with hire as clerk in his service
(518) from October, 1825, till June, 1827—which was credited with full payment, and closed. He also produced an account in the handwriting of the plaintiff, charging the defendant with like services of his intestate from July, 1827, till his death, in the following November, which was also credited with full payment, and dated in 1829. From these two papers, connected with the lapse of time, the defendant contended, that the jury might infer a payment of the present demand. On the plea of the statute of limitations, His Honor instructed the jury, that "to revive the remedy, or to prevent the bar of the statute, there should have been an express promise to pay, or an explicit acknowledgement of a subsisting debt, from which the law could imply a promise." The jury found both the issues in favor of the defendant; and the plaintiff appealed.

Devereaux, for the plaintiff.
D. F. Caldwell, for the defendant.

RUFFIN, Chief Justice: If the instruction excepted to were deemed erroneous, the Court could not reverse the judgment, since the jury found for the defendant, as well upon the first issue on *non assumpsit,* as upon the statute of limitations. *Morisey v. Bunting,* 12 N. C., 3. *Bullock v. Bullock,* 14 N. C., 260. This was probably deemed the truth of the case, since there certainly was evidence from which payment might be cogently inferred.

But we are likewise of opinion, that there was no evidence to take the case out of the statute of limitations. The only witness of the plaintiff stated, that "no admission of the claim was made," either by the defendant or his partner. Upon this, the proper instruction, in the opinion of the Court, would have been simply that the plaintiff's action was barred; for there was nothing to prevent the operation of the statute. There was no credit to be weighed; nor any fact deposed to from which the jury ought to be permitted to infer as a fact, the acknowledgement of the debt. Moreover, if

there had been such evidence, the rule of law is conceived by the Court to be precisely as it is stated in the plaintiff's exception to have been delivered on the trial—that there must either be an express promise to pay, or an ex- (519) plicit acknowledgement of a subsisting debt from which the law can imply a promise. Terms, either exactly the same, or at all events, of equivalent import, were adopted by this Court, at the last term, in the case of *Smallwood v. Smallwood,* (*ante,* 330,) as expressing our sense of the modern adjudications. Having so recently discussed this question, and endeavored to establish the principle in this state, further observations on the subject seem not now to be called for.

PER CURIAM. Judgment affirmed.

Cited: Doub v. Hauser, 29 N. C., 169; *Higdon v. Chastaine,* 60 N. C., 213.

JOHN HINTON v. JOHN J. OLIVER.

If a *scire facias* be sued out upon a judgment of more than ten years' standing, without motion, supported by an affidavit of the debt being due, the judgment unsatisfied, and the defendant living, it may be set aside for irregularity, provided the objection be taken in the first instance; but if the defendant pleads to the merits, he cannot afterwards avail himself of this irregularity.

This was a *scire facias,* issued from Caswell County Court, at its April Sessions, 1832, to revive a judgment which had been rendered in that Court, at its October Sessions, 1821. Upon that judgment it appeared that an execution had issued returnable to January Term, 1822, and returned "nothing to be found," and it did not appear that any other execution had ever issued. On the return of the *scire facias,* "the defendant entered his appearance, and pleaded *nul tiel record, payment, and set-off;* and the cause was continued from term to term, until July Term, 1835, when it came on for trial; and a jury being empanelled, before any evidence was offered, the defendant's counsel moved to dismiss the *sci. fa.,* because it had been issued without motion,

and without an affidavit: and it was dismissed acordingly: upon which the plaintiff appealed to the Superior
(520) Court, where His Honor *Judge Saunders*, on the last Circuit, affirmed the judgment below; and the plaintiff appealed.

J. T. Morehead, for the plaintiff.
W. A. Graham, for the defendant.

GASTON, Judge: The rules of practice in our Courts of law, when not otherwise settled, have been modelled after those which obtained in the Court of King's Bench, before the Revolution. According to the old established usages of that Court, when a judgment was of more than seven, but less than ten years' standing, the plaintiff could not have a *scire facias*, without a side-bar rule: if the judgment had been above ten years old, there must be a motion to the Court, supported by an affidavit of the debt being due, the judgment unsatisfied, and the defendant living; upon which the rule was absolute in the first instance; unless the judgment were of more than twenty years' standing, and then there must be a rule to show cause. We have no side-bar rules here, and therefore a *scire facias* may issue as of course upon a judgment which is not ten years old. But the residue of the rule of practice in the Court of King's Bench has obtained also in our courts.

The *scire facias* in this case issued irregularly, and might have been set aside on objection being made to it in apt time. But it is a well-settled rule, that where there has been irregularity in process, and the party having right to object thereto do not make the objection as early as may be, or as is commonly said, "in the first instance," he cannot afterwards revert to that irregularity. If he overlook it, and take subsequent steps in the cause, he thereby waives his objection. In the present case, the defendant appeared to the *scire facias*, pleaded to the merits, put his cause upon these pleas, and after repeated continuances, moved to dismiss the *scire facias*, because it was sued out not in conformity to the prescribed mode of proceeding. In our opinion, the Court erred in granting the defendant's prayer. The judgment

of the Court below is to be revised; with directions to that Court to proceed to the trial of the issues in (521) the cause.

PER CURIAM. Judgment reversed.

JOHN A. MEAD v. JOSEPH YOUNG and ALFRED BOYD.

1. An arrest is an actual interference with the person, or a compulsory restraint of it. But these terms are not identical; and where an officer, having a warrant, went to the defendant, and informing him of the fact, said to him, "do you submit?" and he answered "certainly," and went with the officer before a magistrate, and there entered into a recognizance to answer the charge; it was *Held*, to be such an arrest as amounted to an imprisonment of the person.

2. A warrant to arrest persons neither named nor described, is void. And one reciting that A. B. "and company" had committed an offence, and commanding the officer to apprehend "said company," will not justify the arrest of any person; for the mandatory part does not direct the taking of A. B. by name, or by any description, and it is not helped by the recital; for the words "said company," refer only to the company with A. B. and not to A. B. himself.

3. Criminal process, defective for uncertainty in the description of the defendant, is not aided by the act of 1794, (*Rev. ch. 414,*) providing that warrants shall not be set aside for want of form: for that act, in its terms, applies to civil process only; and, besides, the description of the defendant is matter of substance.

4. In an action of trespass and false imprisonment for an unlawful arrest, it is admissible to prove that the plaintiff paid the defendant a certain sum of money on account of the transaction for which the arrest was made, in order to show the *animus* which influenced the proceedings.

This was an action of trespass *vi et armis,* for an assault and false imprisonment. Pleas, *the general issue,* and *justification* under process.

Upon the trial of the cause at Rockingham on the last Circuit, before *Saunders, J.,* it appeared in evidence that the defendant, Young, for the purpose of arresting the plaintiff and others on a criminal charge, obtained a warrant from a magistrate, which, after reciting that the plaintiff "and company," had wounded and beat a slave of the defendant commanded the defendant Boyd, (who was not a (522) peace officer, but to whom the warrant was specially

directed) "to apprehend the said company, and them safely keep so as to have them," before a justice of the peace, "to answer the said complaint, and to be dealt with according to law." The defendant Boyd, under colour or by virtue of this warrant went, accompanied by several persons, who were prepared to aid him in case of necessity, in search of the plaintiff, and when drawing near him, left the others a short distance behind, but yet within hearing. Boyd then inquired for the plaintiff, and on the plaintiff answering to his name, informed him that he, the defendant, had a precept against him, and asked, "do you submit?" The plaintiff answered "certainly;" and accompanied Boyd to a magistrate's where the warrant was returned. The magistrate, after hearing the case, determined to bind the plaintiff over; and the plaintiff, not being immediately ready with sureties to join him in a recognizance, at the suggestion of the magistrate, deposited with the defendant Boyd, the sum of three hundred dollars as a pledge for obtaining security and entering into a recognizance on the next day. The money, by the consent of the plaintiff, was then put into the hands of the magistrate; and on the succeeding day the recognizance was given and the money returned.

It further appeared, that after some conversation between the plaintiff and the defendant Young, concerning a compromise, and after Young had said that he had no power to stop the prosecution, the plaintiff paid Young one hundred and fifty dollars, but on what terms, and for what purpose, did not appear, except that it was on account of the transaction charged in the warrant.

His Honor instructed the jury, that although words alone could not constitute an arrest, yet if the defendant Boyd, followed by persons who were prepared to assist him, if necessary, to arrest the plaintiff, told the plaintiff that he had a precept, and asked of the plaintiff whether he submitted, and thereupon the plaintiff did submit himself into custody, these circumstances, collectively, did constitute an arrest. And further, that whether the submission of the plaintiff,
(523) was a submission into custody or not, was a matter which might be collected from the subsequent conduct of the parties to this arrest. He also charged, that as the warrant commanded the defendant Boyd to take no person

by name, or by description, other than by the vague description "company," it did not give an authority to arrest any person. The jury found a verdict for the plaintiff: and the defendants moved for a new trial because of a misdirection of the Court as to the arrest and warrant; and because of the reception of evidence as to the hundred and fifty dollars paid by the plaintiff to the defendant Young. The motion was overruled, and the defendants appealed.

W. A. Graham and *Boyden,* for the defendants.
J. T. Morehead, contra.

GASTON, Judge, having stated the case as above, proceeded as follows: The first error assigned in this case for the reversal of the judgment rendered in the Superior Court is, that the jury was misdirected as to the nature of the restraint which would in law constitute an imprisonment. For the defendant it is insisted, that nothing can constitute an *arrest* amounting to an injurious imprisonment, short of an *actual* interference with the person, or compulsory restraint thereof; and that upon the testimony there was no proof of actual interference with the person of the plaintiff, nor that the submission of the plaintiff was other than a voluntary submission to appear before a magistrate for the investigation of the charge brought against him. Many cases have been produced to establish the legal position taken by the defendants' counsel, which we deem it unnecessary particularly to notice, for we think the position properly understood to be correct. There must be an actual interference with one's person, or compulsory restraint, to constitute imprisonment. But what is meant by compulsory restraint? It is not identical with *actual interference,* or it would be a superfluous description. Is it more or less than submission to restraint without incurring the risque of personal violence and insult by resistance? If an officer, or one claiming a right to *obedience,* require of another to accompany him, this alone is (524) not an arrest. As yet, there is no compulsion, nor restraint. Compulsion is indeed intimated, but is not exerted. But when obedience is yielded to that command—when, in submission to it the person commanded accompanies him who gives the order, the movement is by compulsion, and

not through choice, and his person is then under restraint. The distinction is well taken in Buller's Nisi Prius, page 62, "bare words will not make an arrest; but if a bailiff who has process against one, says to him, when he is on horseback, or in a coach, 'you are my prisoner, I have a writ against you;' on which he submits and goes with him, though the bailiff never touched him, it is an arrest, *because* he submitted; but if, instead of going with the bailiff, he had gone or fled from him, it would be no arrest, unless the bailiff had laid hold of him." In the present case, there was abundant evidence of restraint by compulsion. The defendant Boyd, claiming to have an authority by precept to take the plaintiff's person, and having a force at hand to enable him to execute the alleged precept, announces his authority, and requires submission. It is yielded—the plaintiff goes with the supposed officer, as a prisoner. The precept is returned, executed, and the plaintiff is kept in custody, until he relieves his person from restraint, first, by a conditional deposit of money, and then by entering into recognizances for making his appearance in Court, to answer for the criminal charge upon which he was brought before the magistrate.

The next and most important point in the cause is, whether the arrest of the plaintiff was by lawful authority. His Honor instructed the jury, that as the warrant commanded the defendant Boyd to take no person by name or by description, other than by the vague description "company," it did not give an authority to arrest any person. It has not been questioned, and it cannot be questioned, but that a warrant to arrest persons not named nor described with reasonable certainty, is altogether void. The magistrate who acts upon the information laid before him is to *judge* whether a warrant shall issue, and against whom it shall issue.
(525) The authority of the officer, or person acting under the warrant is purely ministerial. The magistrate must give *certain directions* as to the persons to be arrested—and he who acts under the mandate must arrest those only whom the mandate directs him to arrest. 1 Hale Pleas Crown, 580; Haw. B. 2, ch. 13, sect. 10; *Money v. Leach,* 1 Bl., 562; 3 Burr., 1692; *Wilkes v. Wood,* Loft., 18; 11 State Tri., 323. This certainty in warrants has been deemed so essential to the liberty of the citizen, that our Constitu-

tion denounces all general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of the fact committed—"or to seize any person or persons not named," and whose offence is not particularly described and supported by evidence, as dangerous to liberty, and not to be granted. Declaration of Rights, sect. 11. But the counsel for the defendants contend, that in this warrant the plaintiff is named; and that although the warrant, on the face of it, is illegal and null, so far as it commands the arrest of uncertain persons, it is a valid warrant for the arrest of the plaintiff. We do not deem it necessary to determine whether a warrant containing a mandate forbidden by our Bill of Rights, is altogether null—or whether it is null only so far as it violates that prohibition. For, admitting that it may be good in part—a point not free from doubt—we feel ourselves bound to hold, that the warrant in this case did not command the arrest of the plaintiff, by name, or by certain description. The mandatory part of the warrant—the precept—is "to apprehend *the said company,* and them safely keep, so that you have them to answer," &c. This is unquestionably *per se* altogether vague and uncertain. Is it rendered certain by means of the *reference* contained in the words prefixed to company, "the said company?" On looking into the previous parts of the warrant, all that we find to which a reference can be applied is in the recital that complaint had been made of a battery committed by John Mead and company. The "said company," in the precept means the company mentioned in the recital. It can mean in the precept only what it means in the recital. It comprehends no more in the one than it embraces in the other. In the recital it means and comprehends the (526) associates or companions of John Mead only, and not Mead himself; in the precept, therefore, it means and comprehends these associates only. Who are they?

It has been urged, that the warrants of magistrates ought not to be examined in the spirit of minute criticism; and in support of this proposition, we are referred to the 16th sect. of the act of 1794, (*Rev. ch.,* 414) by which it is declared, "that no attachment, warrant, or other process issued by a justice of the peace, shall be set aside for the want of form, if the essential matters required are set forth in such

process." This enactment, *as such,* must be understood as applying only to the subject-matter of the act, which is an act directing *the mode of recovering debts* before justices of the peace. But we adopt unhesitatingly the *principle* contained in the enactment, as one recognized by the common law in reference to the subject before us. But is the objection to the validity of this warrant one merely for *want of form?* By the best established principles of the common law—principles deemed so important, as to be embodied in our Constitution, and placed beyond the reach even of legislation—certainty of the person so to be seized, is "an essential matter required," in every warrant to apprehend a man for an imputed crime. In the judgment of the Court, there was no error in this part of the judge's charge.

Another point has been taken by the defendants, that the judge erred in permitting testimony to be heard by the jury of the payment by the plaintiff to the defendant Young, of one hundred and fifty dollars on account of this business. In answer to this objection, it would be sufficient to say, that it does not appear who offered this testimony, whether the plaintiff or the defendant; and that if it could be inferred from the case, that it was offered by the plaintiff, it does not appear that objection was made to the reception of it. But waiving these answers, we are at a loss to see on what good ground *either* party could object to its being brought before the jury. It was a part of the transaction to be investigated,

(527) material to show the *animus* which influenced the proceedings—whether an honest purpose to vindicate an acknowledged and severe injury, or a corrupt scheme to extort money by an oppressive prosecution. In what light it was considered by the jury, we have no means of knowing. But it was a circumstance, in connection with all the other circumstances of the case, fit to be considered and weighed in fixing the amount of damages. The judgment is affirmed.

PER CURIAM. Judgment affirmed.

EDWARD HASKINS v. JOSEPH YOUNG and ALFRED BOYD.

1. A warrant for the apprehension of a man's person cannot be rightfully altered after it has *finally* left the hands of the magistrate who issued it. And if it be altered by another magistrate after it has been so issued, by inserting the name of another person to be apprehended, it will be no justification to the officer who executes it for taking such other person.

2. Where a person went voluntarily before a magistrate, and while there, an officer, to whom a warrant against him for a criminal charge was directed, said to him, "there is a warrant against you; do you submit?" and he answered that he did; and then entered into a recognizance for his appearance to answer the charge specified in the warrant, it was *Held* to be an arrest amounting to an imprisonment of the person.

This was an action of the same kind with the preceding one of *Mead v. Young,* arose out of the same transaction, and was tried at the same time. In addition to the circumstances mentioned in that case, it is necessary to a proper understanding of the objections taken to the charge of the judge in this, to state, that the present plaintiff was in company with John A. Mead at the time of the beating of the slave of the defendant, Young, but was not arrested at the same time with Mead. The warrant sued out was granted by a magistrate, also of the name of Young, and a relation of Young, the defendant; but was returned before Mr. Reed, another magistrate of the county, because the magistrate who issued it refused, after it was issued, (on account of this connection) to interfere any further with the (528) matter. On reading the warrant ,Mr. Reed remarked, that it called for the company, and inquired who were the company; upon which John A. Mead mentioned himself, the plaintiff, and Theophilus Mead; and thereupon Reed, without saying any thing to the magistrate, Young, who was in the room, but took no part in the proceedings, inserted the names of Theophilus Mead and the plaintiff in the first part or recital of the warrant, so as to cause the same to read, that complaint had been made that John Mead, Theophilus Mead, and Edward Haskins *and company* had beaten the slave of the defendant, Young; but made no alteration in the perceptive or mandatory part of the warrant, which yet remained, "to apprehend the said company." On hearing the evidence,

the magistrate Reed decided on binding over the parties; when it was propesed (it does not appear by whom) to send for the plaintiff; and the two Meads went for him. On his arrival, he was asked by the Magistrate if he was Haskins; and upon his answering in the affirmative, the defendant, Boyd, said to him, "there is a warrant against you," (pointing to the warrant upon the table) "do you submit?" The plaintiff answered, that he did; and thereupon, after hearing what he had to say, the magistrate decided on binding him over also. The difficulties occurred about finding securities, which are stated in the case of Mead against these defendants. The deposit of money was made, as therein set forth, for the relief of Haskins, as well as of Mead; and on the succeeding day recognizance with sufficient security was entered into for the appearance of the plaintiff, at the ensuing term of the Court.

His Honor charged the jury, that the alteration made in the warrant by the magistrate Reed, without the authority of the magistrate Young, was illegal; and the arrest of the plaintiff under a warrant so altered, was without authority; and that if the jury collected from what passed between the defendant Boyd and the plaintiff, after the latter came before the magistrate, and from what occurred afterwards, that the plaintiff submitted himself into custody, and was so considered and treated by the defendants, then the plain-
(529) tiff was arrested; and if arrested without authority, such arrest was in law a false imprisonment. The jury found a verdict for the plaintiff. The defendants appealed.

GASTON, Judge: This action of trespass and false imprisonment has grown out of the same transaction which gave rise to the action of John A. Mead against these defendants, in which an opinion has just been pronounced. For the proper understanding of the exceptions taken in this case, it is necessary to state, in addition to the circumstances mentioned in the opinion referred to that, &c. (Here his Honor stated the circumstances of the case, and the charge of the judge thereupon, as mentioned above; and then proceeded as follows:) We hold both parts of the charge to be correct. A warrant for the apprehension of a man's person is an act

of no unimportant character; and certainly no alteration can be rightfully made in it after it has *finally* left the hands of the magistrate who issued it. He decides upon his official responsibility, whether a warrant shall issue, and against whom it shall issue. Altered without his authority, it is no longer *his* warrant—and if it be not the warrant of the magistrate under whose signature it is sent forth, whose warrant is it? It may be remarked, however, that independently of the ground upon which the judge held the apprehension of the plaintiff illegal, the warrant, supposing it rightfully altered, was yet open to the same objection which we have held fatal in the other case. In its mandatory part it contained no names of the persons to be arrested, nor in any way described them, but as the 'said company.' We think, also, for the reasons given in the former case, that the other part of the instruction complained of was correct. *Boyd,* claiming authority to take the plaintiff under the warrant directed to Boyd, inquired of him whether he submitted to such arrest—received his submission—and detained him in custody under it until he ransomed his person from restraint. The judgment is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Blair v. Horton, 51 N. C., 544; *State v. Ferguson,* 67 N. C., 221.

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(530)

Den ex dem. JOHN GIBSON v. NOAH PARTEE.

1. Where an instrument purporting to convey land, was signed, sealed and delivered, by the grantor to the grantee, it is a deed, and not an *escrow;* although the parties afterwards placed it with a third person for safe keeping until they both should call for it.

2. Fraud in the execution of a deed will, at law, avoid it.

3. The only legal proof of a judgment, is by the production of the formal entry of it; but minutes made during the progress of a cause, if received without objection to their form, are sufficient proof of the judgment, if from them a formal entry can be made up.

4. Matters which might have been introduced on the trial, but brought forward for the first time upon a motion for a new trial should not be acted upon by the court.

Ejectment, tried at Rowan, on the last Circuit, before his Honor *Toomer, J.*

The plaintiff in support of his claim, first offered in evidence, an instrument duly proved and registered, which he alleged to be a deed for the land in dispute, from Andrew Bahel, to his son Jacob Bahel. The defendant contended that the instrument had never been delivered as a deed, but only as an *escrow;* and to prove that fact he introduced witnesses, who testified that Jacob Bahel was to give a bond to his father Andrew to maintain him during his life; and Andrew, the father, was to convey the land to Jacob: that the old man seemed uneasy before the instruments were executed, lest his son should fail to comply with the stipulations of the bond, but those present informed him that he would have a claim to the land, should Jacob fail to support him; and also, that he might sue on the bond and get his land back again; that the bond and deed both were drawn by Mr. Barnhart, and the bond was then signed and sealed by Jacob and delivered to his father, and the deed was signed and sealed by Andrew and delivered to Jacob; that the parties then respectively handed the bond and deed to the witness, to be kept until they should come together and call for them. Andrew Bahel was then about seventy years old, and was ignorant as to matters of law. The plaintiff then introduced Mr. Barnhart, who stated that, at the request of Andrew and Jacob Bahel he drew both the bond and deed, and attested
(531) to the execution and delivery of them: that the bond was signed and sealed by Jacob to Andrew, and the deed was signed and sealed by Andrew, and delivered by him to Jacob: that John Gibson, the lessor of the plaintiff was present, and after the execution of the instruments, the parties wished to place them in his hands, but he declined receiving them; whereupon both parties agreed to place them in the hands of one Cowell for safe keeping, with instructions to retain them until both Andrew and Jacob should call for them, or until the death of Andrew. It was also proved, that Andrew Bahel had died, and Cowell had been compelled by legal process to produce the deed for probate and registration. The deed was executed and bore date 5 Sep., 1830.

The lessor of the plaintiff, in further support of his title,

then offered in evidence the record of a judgment obtained by him against Jacob Bahel, in an action instituted by original attachment, in the County Court of Rowan. The attachment bore date 1 Jan., 1834, and was issued against the estate of Jacob Bahel, for a debt of one hundred and fifty dollars, due by note, with the interest accrued thereon, returnable to February term, 1834, of Rowan County Court, and was returned levied upon the premises in dispute.

At the return term, an order of publication was made; and at the succeeding term, in May, the following entry appeared upon the trial docket: "Judgment of the Court, that publication has been made:" and also another in the words following to-wit: "Judgment by default, final, according to specialty filed." A note was then produced from the officer of the Court, filed among the papers in that cause, purporting to be a promissory note under seal, given by Jacob Bahel to John Gibson for one hundred and fifty dollars, dated 20 October, 1818, and payable three months after date. On the execution docket the following memorandum was entered: "$288 with interest on $150, from May, 1834, until paid, for debt, also $9 53-100 for costs." A *venditioni exponas* for the debt and costs, was then produced, directed to the sheriff of the county, and commanding him to sell the land levied on under the attachment; and a return endorsed on the process, showing a sale, and that the (532) lessor of the plaintiff was the purchaser. It appeared in evidence that there were no entries in relation to this suit, on the minutes of the Court. It was objected by the defendant, that there was no judgment, because the entry was for no certain sum: but the Court adjudged that there was a judgment, that *id certum est, quod certum reddi potest,* and the record was read in evidence. The lessor of the plaintiff then offered a deed from the sheriff, reciting the *venditioni exponas,* and conveying the premises described in his declaration to him.

His Honor instructed the jury in relation to the deed from Andrew Bahel to his son Jacob Bahel, that it was not sufficient for the plaintiff to show that Andrew had signed and sealed it, but he must also show that it was delivered by Andrew to Jacob as the act and deed of Andrew for the purpose of conveying to Jacob the premises therein described: that

the instrument was sufficient on its face to pass title, provided they were satisfied that it was delivered to Jacob by Andrew as his act and deed, and for the purpose of transferring the title; which was a matter of fact, exclusively within their province to decide: that if they were satisfied from all the circumstances of the case, that the delivery was made to Jacob, by his father, as his act and deed, and for the purpose of transferring title, then the verbal agreement referred to by the witnesses, if subsequently made, could not divest the title of Jacob; and that on the probate and registration of said deed, the title had relation to the period of its delivery: that where an instrument was executed as a mere *escrow,* and not intended to operate as a deed, it should be delivered to a third person, and not to the grantee. The jury were also instructed, that if the deed was procured from Andrew by any imposition practised on him by any person, or if there was any fraud in its execution, it was null and void, and no title ever passed to Jacob: that in considering these questions, they should take into consideration the age, infirmity, and ignorance of Andrew, in connection with all the attendant circumstances: that they had a right also to take into
(533) consideration the presence of Gibson, and that he was a creditor of Jacob's, and that he could not collect his debt from Jacob; and that if he used any artifices to procure the execution of the deed, which imposed on Andrew, the instrument was fraudulently obtained and was void.

The jury returned a verdict for the plaintiff; and the defendant moved for a new trial; and urged two matters which had not been introduced or adverted to on the trail, to-wit, that there had been no judgment condemning the land; and that the attachment and all the proceedings thereon were in a suit wherein John Gibson was plaintiff, and Jacob Bahel defendant; and that the sheriff's deed to Gibson for the land sold, was under a *venditioni exponas,* against Jacob Bahel; and that no evidence has been offered to show title to the premises in Jacob Bahel, for that the deed from Andrew the father to his son Jacob, was from Andrew Pahel to Jacob Pahel. To this it was replied, that no other judgment than the one exhibited, was necessary; and that if the objection to the names had been taken on the trial, it could have been shown that Andrew the father, and Jacob the son, were

known as well by the name of Bahel as Pahel. The motion for a new trial was overruled; and the defendant appealed.

Boyden, for the defendant.
Caldwell, for the plaintiff.

GASTON, Judge: We see no ground for exception on the *part of the defendant,* to the charge of the judge in relation to the execution of the deed of Jacob Bahel. According to the testimony of every witness examined on the subject, it was executed as a deed, and not delivered as an *escrow;* and his Honor, we think, should have charged the jury, if they believed the evidence, such was the legal effect of it. If there was any fraud practised *in the execution* of the deed, such fraud would in law avoid the deed; and the instruction of the judge went at least to that extent.

Upon the other question made at the trial, whether the writ of *venditioni exponas* was warranted by a judgment, we do not understand that objection was made (534) to the reception of the clerk's minutes and entries as evidence; for it is impossible for us to be ignorant of the *universal* usage at the bar, to receive such memoranda instead of requiring a formal record, but that these when received in evidence did not show a judgment. So understanding the objection, we think that it was properly overruled.

The law is express in requiring of every clerk, where a cause is finally determined, to enter all the proceedings therein, in a well-bound book; and make an entire and perfect record thereof. This record is of course made out from the memoranda, or short minutes entered upon the dockets, and in the journal of the Court's daily proceedings. These are the materials by means of which the record is to be subsequently completed; but they are not the record, and of course are not admissible as such, if objection be thereunto taken. It is never taken, we believe; and the consequence of this liberal practice—a very unfortunate consequence—is, that clerks very seldom make out a record; and that few of them can do so without professional assistance. When these minutes are received in lieu of the record required by law, they must be regarded as sufficiently certain, if from them a certain record can be made out. The rule of *"id certum est,*

quod certum reddi potest," is properly applied in such a case; for otherwise, being but incomplete memoranda, they would always want the necessary certainty. Applying that rule to the present case, a complete record could have been made. There was a memorandum that judgment had been rendered for the plaintiff, agreeably to the specialty filed; and the amount of that judgment, was a mere subject of computation.

As to the matters brought to the notice of the Court for the first time, on the motion for a new trial, we think his Honor properly refused to act upon them. The judgment is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Reed v. Moore, 25 N. C., 314; *Brooks v. Ratcliff,* 33 N. C., 325; *Peterson v. Vann,* 83 N. C., 121.

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WEED & BENEDICT v. BENJAMIN RICHARDSON and The Executors of A. McDOWELL.

1. A partnership security taken for the debt of one of the partners, without evidence of the assent of the others, is void of law.

2. In an action against two, there cannot be a judgment against both for part of the demand, and against one of them for the residue; and an amendment in the appellate count, will be allowed only upon the payment of all costs.

The plaintiffs were merchants in Charleston, South Carolina, to whom the defendant, Richardson, became indebted, in the sum of fourteen hundred and thirty-six dollars and fifteen cents, for goods to supply a country store, which he had established in Buncombe county. The debt was secured by Richardson's note, which had been due a considerable time prior to 20 March, 1832; and the plaintiffs had indulged him on his application. On 20 March, 1832, M'Dowell, the intestate of the other defendants, became a partner with Richardson, and others, in that store, and others; all which were under the general mangement of Richardson, under the name of B. Richardson & Co.; and on 19 June, 1832, Richardson, without the assent or knowledge of M'Dowell, gave

to the plaintiffs the promissory note of B. Richardson & Co., for the before-mentioned debt of his own, payable 1 Dec. following: and at the same time gave to them another promissory note of the firm for one hundred and eighty-three dollars and fifty cents, payable six months after date, for merchandise then purchased for the firm of B. Richardson & Co. M'Dowell having died, the plaintiffs instituted this action of debt against Richardson and the executors of M'Dowell, in which they declared in one count on the small note, and in a second count on the other. The case came on for trial at Burke, on the last Circuit, before *Settle, J.*, upon the general issue; and his Honor, upon the facts appearing as above stated, instructed the jury, that as the consideration of the note declared on in the second count, was the debt of Richardson individually, and that was known to the plaintiffs, it was fraudulent in law on (536) M'Dowell to take the note of the partnership therefor. The jury found a verdict against all the defendants on the first count, and against Richardson, and in favour of M'Dowell's executors, on the second count; and after motion for a new trial for misdirection, overruled, and a judgment for the plaintiffs according to the verdict, they appealed.

No counsel appeared for the plaintiffs.
Iredell and *Caldwell*, for the defendants.

RUFFIN, Chief Justice, having stated the case as above, proceeded as follows:

This Court approves of the directions to the jury. It is stated, that the note was given without the assent of M'Dowell; and there are no circumstances in the case from which any reasonable belief on the part of the creditors can be justly inferred, that it was given with his consent. It is now well settled at law, that it is *prima facie* fraudulent for a separate creditor of one of the firm to take from him the security of the firm: for it is a security which the creditor knows his separate debtor ought not to give, without the consent of the firm; and therefore he cannot honestly take it. *Cotton v. Evans*, 21 N. C., 284.

But the Court is unable even to affirm the judgment as far as it goes for the plaintiff. In an action against two,

there cannot be a judgment against both for part of the demand, and against one of them for the residue—thus requiring different writs of execution upon the same judgment. All that can be done here is to allow the plaintiffs to amend by striking out, at their election, one of the counts in the declaration, and that part of the verdict which relates to such count; and then they may have a corresponding judgment. This is allowed in this Court, because it would be an amendment of course in the Court below, to answer the justice of the case. *Grist v. Hodges,* 14 N. C., 198. But an actual amendment being necessary, the plaintiff must
(537) pay the costs in both Courts, as a condition.

PER CURIAM. Judgment accordingly.

Cited: Wells v. Mitchell, 25 N. C., 486; *Norment v. Johnson,* 32 N. C., 91; *Justices v. Simmons,* 48 N. C., 189; *Dick v. McLaurin,* 63 N. C., 187; *Hartness v. Wallace,* 106 N. C., 431.

Den ex dem. JOEL F. MOTLEY v. NANCY WHITEMORE.

In lands conveyed to husband and wife, they have not a joint estate, but hold by entireties; and upon the death of either of them, the whole estate continues in the survivor, notwithstanding the act of 1784, (see *1 Rev. Stat. c. 43, s. 2,*) for abolishing the right of survivorship.

This was an action of ejectment, in which the following facts were submitted to his Honor *Saunders, J.,* at Caswell, on the last Circuit. The plaintiff's lessors claimed title to the land in controversy, by virtue of a judgment, execution, and sheriff's deed; and produced the records of two judgments, rendered in Caswell County Court, in favor of himself and one Nannally, at July Term, 1833, against the administrators of Louis Whitemore, deceased. It appeared, that the administrator, among other things, had relied on the plea of fully administered, which had been found for him; and judgments had been signed for the plaintiff's demands. Writs of *scire facias* had been sued out thereon against the heirs at law of the said Lewis Whitemore, and judgment rendered upon the same at October Term, 1835,

upon which writs of *venditioni exponas* were issued; and at January Term, 1836, the land was sold, and a deed executed therefor by the sheriff to the plaintiff.

The defendant was the widow of Whitemore, and was in possession of the land sued for; and she claimed to be sole seized thereof by devise from one John Hudnall, her father, in the following words, to-wit: "I give to Lewis Whitemore and his wife, the tract of land whereon I now live." The defendant was the wife referred to in the devise; and the land devised was admitted to be the same mentioned in the plaintiff's declaration.

His Honor, upon these facts, being of opinion with the defendant, a verdict of not guilty was entered in pursuance of an agreement between the parties to that (538) effect; and the plaintiff appealed.

W. A. Graham, and *J. T. Morehead,* for the plaintiff.
Norwood, for the defendant.

GASTON, Judge: We entirely approve of the opinion expressed by his Honor below. When lands are conveyed to husband and wife, they have not a joint estate, but they hold by entireties. Being in law but one person, they have each the whole estate as one person; and on the death of either of them, the whole estate continues in the survivor. This was settled, at least as far back as the reign of Edward III, as appears from the case on the petition of John Hawkins, as the heir of John Ocle, quoted by Lord Coke, 1 Inst., 187a; (See *Buck v. Andrews,* 2 Vern., 120; *Freestone v. Parratt,* 5 Term, 652.) Our act of 1784, (sec. 1 *Rev. Stat.* c. 43, sec. 2) declaring, that in estates held in joint-tenancy, "the part or share of the person first dying shall not go to the survivor, but to the heirs or assignees respectively of the tenant so dying, has no application to a case of this kind. The husband and wife were not joint-tenants, nor had either any *share* to go to the survivor, or to the heir or assignee of the one dying first.

The judgment is to be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Woodford v. Higly, 60 N. C., 235; *Long v. Barnes,* 87 N. C., 334; *Rowland v. Rowland,* 93 N. C., 217;

Simonton v. Cornelius, 98 N. C., 436; *Harrison v. Ray,* 108 N. C., 216; *Bruce v. Nicholson,* 109 N. C., 204; *Phillips v. Hodges, Ib.,* 250; *Gray v. Bailey,* 117 N. C., 442; *Stamper v. Stamper,* 121 N. C., 254; *Ray v. Long,* 132 N. C., 895.

(539)

JOSEPH TURNER v. ELLIS EDWARDS.

The term "book account" may comprehend a signed account, as well as an open one; and where the judgment of a single magistrate appeared to have been given on a warrant for more than sixty dollars, due by book account, it is to be taken, in support of the magistrate's jurisdiction, that the book account was a signed account.

This was an action of assumpsit, commenced by a warrant before a single magistrate, and carried by appeal to the Superior Court of Haywood County, where it was tried, on the last Circuit, before his Honor *Settle, J.*

On the trial, it appeared, that the defendant in the present action had, on the 25th of September, 1835, warranted the plaintiff in a plea of debt "due by book account," for the sum of one hundred dollars, and obtained a judgment before a single justice, for eighty-six dollars and seventy-five cents, and cost. Upon this judgment the defendant had an execution issued, which was satisfied. The plaintiff, on 5 Jan., 1836, warranted the defendant for fifty dollars in assumpsit for money had and received to his use; it being part of the money which he had paid the defendant on the judgment above-stated.

The plaintiff contended, that the judgment rendered against him, for eighty-six dollars and seventy-five cents, *"due by book account,"* was null and void, being for a sum beyond the jurisdiction of a justice; but his Honor was of opinion, that the judgment was not void; and the plaintiff was thereupon non-suited, and appealed.

No counsel appeared on either side.

DANIEL, Judge, after stating the case as above, proceeded as follows: The law gives jurisdiction to a single justice, for any sum under one hundred dollars, if due by signed account. The judge could not judicially know, that the

sum of eighty-six dollars and seventy-five cents, for which the judgment was rendered, (and said to be due by a book account) was in fact due by an open account. (540) The words *"book account,"* do not carry with them any definite legal import or meaning; they may, for what we know, comprehended a signed account. In *M'Farland v. Nixon,* 15 N. C., 141, this Court said, "it must be intended, that the plaintiff alleges his claim to be one of which the justice had jurisdiction; and therefore it cannot be otherwise understood than for a debt due by signed account. The warrant being the plaintiff's declaration, no evidence could be rightly received by the justice which did not sustain it." Now we cannot see, from any thing in this case, that the evidence exhibited before the justice did not sustain the warrant; we cannot see, or legally and judicially understand, that the *book account* was not a signed account. We must take it (from the case made) that the justice did have jurisdiction, as the negative is not shown. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

STATE v. THOMAS BOBERTS.

1. It is competent for the Court, after a motion in arrest of judgment, to alter the record during the same term, by inserting into, or striking from the minutes, whatever may be necessary to make it, when enrolled, speak the truth; and if, by such alteration, the grounds for a motion in arrest be removed, upon an appeal, nothing can be looked to but the record in its completed state.

2. A motion in arrest of judgment, cannot be sustained, because it does not appear from the endorsement on the indictment that the witnesses were sworn before they were sent to the grand jury; for the judgment can be arrested only for matter appearing, or for the omission of some matter which ought to appear in the record, and those endorsements form no part of the bill.

This was an indictment for murder, tried at Perquimans, on the last Circuit before *Pearson, J.*

After the jury had returned a verdict of guilty, the pris-

oner's counsel moved, in arrest of judgment, because
(541) it did not appear that the witnesses examined by the grand jury had been sworn in Court, as the endorsement upon the bill, "sworn and sent," was tested by R. B. Thack, and not by Joseph B. Thack, the clerk of the Court; and the word "clerk," was not added to the name of R. B. Thack upon the bill. There was no such person as R. B. Thack. Joseph B. Thack had qualified as clerk at that term, and being new in office was permitted to have the assistance of one John Ward, the clerk of the County Court who sat at the clerk's table with his principal during each sitting of the Court at that term, and made the entry upon the bill. Joseph B. Thack, the clerk, and Wood the assistant, both stated that the witnesses were sworn in open Court, before they were sent to the grand jury; and Wood stated, also, that not having been theretofore in the habit of signing the name of Thack, he had inadvertently signed it R. B. Thack, instead of J. B. Thack, and had omitted to add "clerk." The Court, thereupon ordered the following entry to be made upon the minute of the Court, to-wit:

"The State
v.
"Thomas Roberts. } Indictment for murder.

"In this case the following persons, to-wit, (the witnesses) "were sworn and sent with the bill of indictment to the "grand jury. This entry was made by the permission of "the Court, after the jury had returned their verdict, and "after a motion in arrest of judgment, upon its appearing "to the satisfaction of the Court, that the witnesses had "been duly sworn and sent; and that the assistant clerk, "by mistake, signed the name of R. B. Thack, instead of "J. B. Thack, and had omitted to add the word clerk in "his endorsement on the back of the bill of indictment."

The motion in arrest of judgment was reversed; and the prisoner appealed.

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Devereux, for the prisoner.
The Attorney-General, for the state.

STATE *v.* ROBERTS.

RUFFIN, Chief Justice: If the objection which was made in this case, could be taken by way of motion in arrest of judgment, the ground of it, in point of fact, is entirely removed by the statement in the record, that the witnesses, on whose evidence the bill was found, were sworn by the Court on the bill, and sent with it to the grand jury. It is entirely competent to the Court at any time during the term to alter, by inserting into, or striking from the minutes, whatever may be necessary to make the record, when made up and enrolled, speak the truth; and this Court can look only to the record in its final completion.

But, in the opinion of the Court, the objection if founded in fact, cannot be raised in this stage of the proceedings, or rather, in this form. Judgment can be arrested only for matter appearing in the record, or for some matter which ought to appear and does not appear in the record. If a bill of indictment be found without evidence, or upon illegal evidence, as upon the testimony of witnesses not sworn in Court, the accused is not without remedy. Upon the establishment of the fact, the bill may be quashed. *State v. Cain,* 8 N. C., 352. Or the matter may be pleaded in abatement. But the judgment cannot be arrested; for it is no part of the record, properly speaking, to set forth the witnesses examined before the grand jury, or the evidence given by them, more than it is to set out the same things in reference to the trial before the petit jury. A memorandum of the witnesses intended to be used is generally made on the bill by the prosecuting officer for his own convenience, that he may know whom to call; and the clerk usually avails himself of it, and marks the names of such as are sworn, in aid of his memory, if the fact should be disputed. But none of those endorsements are parts of the bill, or are proper to be engrossed in making up the record of a Superior Court; which merely states that it was presented by the jurors for the state upon their oaths. The act of 1797, (see 1 *Rev. Stat.* c. 35, sec. 6) does not require any change in the form of the entry, in the case of an indictment, but simply prescribes that no person shall be arrested or charged but upon a bill (543) found by the grand jury to be a true bill.

The Court, therefore, perceives no reason why the judgment should not be carried into execution.

PER CURIAM. Judgment affirmed.

Cited: Galloway v. McKeithan, 27 N. C., 13; *State v. Guilford,* 49 N. C., 85; *State v. Barnes,* 52 N. C., 21; *State v. Harwood,* 60 N. C., 231; *State v. Horton,* 63 N. C., 596; *State v. Douglass, Ib.,* 502; *State v. McMillan,* 68 N. C., 441; *State v. Hines,* 84 N. C., 811; *State v. Cannon,* 90 N. C., 712; *State v. Lanier, Ib.,* 715; *State v. Bordeaux,* 93 N. C., 563; *State v. Sheppard,* 97 N. C., 403; *State v. Hollingsworth,* 100 N. C., 537; *State v. Ivey, Ib.,* 542; *State v. Harrison,* 104 N. C., 731.

STATE v. LOGAN B. HENDERSON.

A person convicted of manslaughter may be burned in the hand, and also imprisoned for any time not exceeding one year. The statutes of 4 Henry VII, c. 13, and 18 Eliz. c. 7, not being altered in this respect by the act of 1816, (*1 Rev Stat. c. 34, sec. 26 and 27*).

The prisoner upon an indictment for murder, at Rutherford, on the last Circuit, before *Settle J.,* was convicted of manslaughter; and was thereupon sentenced to be burned in the hand; and also to be imprisoned until the succeeding term of the Court. His counsel objected to that part of the sentence which directed the branding in the hand; and upon the objection being overruled, the prisoner appealed.

Burton, for the prisoner.
The Attorney General, for the state.

RUFFIN, Chief Justice: The only question made in this case is, whether one convicted of manslaughter may be sentenced to be burned in the hand; and also to be imprisoned for six months. Upon it the Court entertains no doubt; but we are all of opinion, that he may.

The statute of 4 Hen. VII, c. 13, (see 1 *Rev. Stat.* c. 34, sec. 26) prescribes the burning in the hand upon convictions

of clergiable felonies. The statute 18 Eliz. c. 7 (see 1 *Rev. Stat.* c. 34, sec. 27) enacts, that after clergy allowed and burning in the hand, the person shall forthwith be delivered out of prison; with a proviso, nevertheless, that the Court, for the *further* correction of such person, may detain him in prison for such convenient time as the Court (544) may think proper, not exceeding one year.

By the terms of those statutes, both punishments might be inflicted together; and they have often been so inflicted.

But it has been argued, that our act of 1816, (see 1 *Rev. Stat.* c. 34, sec. 26) alters the law; and that under it the convict cannot be burned in the hand, if the sentence impose any other punishment besides that of burning. The opinion of the Court is decidedly to the contrary.

That act creates a substitute for burning in the hand, and for that only. "Instead of burning in the hand," the Court may order the convict to be whipped, or to pay a moderate fine; and such judgment shall have the same legal effect and consequences—and no more—to all intents, as if the person had been burned in the hand in the presence of the Court. These terms leave the subject of imprisonment and the statute of Elizabeth untouched; and we know that statute has always been in force and use in this state.

The judgment is therefore, we think, warranted by law; and it must be certified accordingly to the Superior Court, that its execution may be proceeded in at the next term.

PER CURIAM. Judgment affirmed.

STATE v. JOHN JONES.

Where one got staves upon the land of another upon a contract to have half for getting them, it was *Held*, that while they remained on the land undivided, the manufacturer was neither a tenant in common with the owner of the land, nor a bailee of them; and that, therefore, he, or any other person with his connivance, might be guilty of larceny in taking them.

This was an indictment for petit larceny, tried at Gates on the last Circuit, before *Pearson, J.*

It was in proof, on the trial, that Hardy Jones, a brother of

the defendant, had agreed with one Jenkins, to get
(545) staves upon the lands of Jenkins, upon shares; that is, Jones was to have one half of the staves for getting them. Under this agreement, Jones set a negro to work, and after he had got out about three hundred staves, the defendant and his brother Hardy carried off about two hundred of them secretly, and without the privity or consent of Jenkins, and sold them.

His Honor charged the jury, that if the defendant, in company with his brother Hardy, carried off the staves secretly, without the privity or consent of Jenkins, with an intent to defraud Jenkins, and convert the staves to his own use, he was guilty of larceny. The defendant was found guilty, whereupon his counsel moved for a new trial for error in the charge, insisting that Hardy Jones had such an interest in the staves as gave him a right to take them; and that although it was a fraud upon Jenkins, it was not larceny. The motion was overruled; and the defendant appealed.

Devereux, for the accused.
The Attorney General, contra.

DANIEL, Judge: The defendant contends, first, that his brother Hardy Jones, was a tenant in common of the staves with Jenkins; and that, as his brother was with him at the time the staves were taken and carried away, and assented to the act, it was not, in law, a larceny. The question for the decision of the Court is, was Hardy Jones a tenant in common with Jenkins in the staves? Jenkins was the sole owner of the land on which the timber trees grew that furnished the entire materials out of which the staves were manufactured. Hardy Jones did not lease the land, but he agreed with Jenkins to go on his land, and there, by himself or servants, to labour in making staves; and was to have one-half of the staves manufactured, instead of cash, in payment of his work and labour. We so understand the case. The language is, "Hardy Jones agreed with one Jenkins to get staves upon the land of Jenkins, upon shares, that is, Jones was to have one-half of the staves for getting them." Evi-
(546) dently as payment, or a mode of payment for his work and labor. If a man builds a vessel, or makes

a coat, with the entire materials of another, the vessel or coat, when made, belongs to the owner of the materials. If a man engages another person to come and labour on his farm, as overseer, or cropper, and stipulates with him that he shall have a share of the crop for his labour and attention, the property in the entire crop is in the employer until the share of the overseer or cropper is separated from the general mass; and then, and not until that act is done, does the title to the share vest or become executed in the labourer. Before the separation, the labourer's right rests upon an executory contract with the employer. Before separation, it could not be levied on to satisfy the labourer's debts. So in the present case, the property in the entire lot of staves, was in Jenkins; no separation of the quantity for Jones's labour had taken place. Hardy Jones, was not, as we think, a tenant in common with Jenkins.

The second objection taken by the defendant's counsel, that Hardy Jones was *bailee* of the staves, is, in our opinion, equally untenable. The slave of Jones worked out the staves, and left them at the place where he found the timber, and that was on the land of Jenkins, the owner. Hardy Jones, while his slave was there at work, may be said to have had charge of them, but he was not a bailee: the property and the possession was in Jenkins the owner. We discover no error in the charge of the Court. This opinion will be certified to the Superior Court of law for the County of Gates, that it may proceed to judgment.

PER CURIAM. Judgment affirmed.

Cited: Deaver v. Rice, 20 N. C., 569; *Cole v. Hester,* 31 N. C., 27; *McNeely v. Hart,* 32 N. C., 65; *Brazier v. Ansley,* 33 N. C., 14; *State v. Biggs,* 34 N. C., 3.

(547)

STATE v. SOLOMON SPAINHOUR

If a road be established as a highway by an erroneous judgment of the County Court, it will be a nuisance to obstruct it, until the judgment be reversed. It is enough, that the way obstructed is a public road *de facto*, to constitute the obstruction of it a public nuisance. But where the proceedings to change a road, state no road as having been prepared; nor describe where the altered road is to run, except that it is to be brought nearer a particular house; and the prayer is only that an order may be "made for turning the road," and then an entry appears that "said report was confirmed, and duly entered of record," there is no sufficient judgment for establishing the road as altered, and it is not a nuisance to obstruct it.

The defendant was indicted at Stokes, on the last Circuit, before *Saunders, J.*, for obstructing a public highway.

On the trial it appeared, that before June Term, 1835, of the County Court of Stokes, the public road ran at some distance from a private way, which passed near the dwelling of John H. Bitting, and through the land of the said John unto and beyond the place obstructed, which was in the new road on the land of the defendant. Bitting being desirous of turning the public road so as to make it pursue the route of this private way, caused the proceedings to be had, which were set forth in a record of the County Court, viz. a petition or recommendation dated 21 May, 1835, addressed to that Court, signed by John Gordon and others, stating "that they had been called upon by Solomon Spainhour," (the defendant) "a magistrate of said county, at the request of John H. Bitting, to view and examine the road fronting said Bitting's house, on the hollow road; and give it as their opinion, that to turn the road near his house will make it much better and firmer, and will also suit his convenience, and be no inconvenience to the travelling public; and do therefore recommend, that at the next term of the County Court, an order may be made that said road may be turned." To this representation was appended a certificate, subscribed by the defendant, as a justice of the peace of said county, and declaring that he concurred fully in the above recom-

(548) mendation; and that the road was principally on the said Bitting's land. The record then proceeded to state, that at June Term, 1835, of said Court, "said report

was confirmed by Court, and duly entered of record." It was proved that none of the petitioners were sworn: that they made no view or examination of the new road intended, but were well acquainted with it as a private way: that the defendant was present when they made out and subscribed their recommendation; and that he understood the alteration proposed. It also appeared, that the overseer of the road had not been notified of the proceedings until after they had taken place, but when apprised of them made no objection, as he thought the change beneficial. The defendant, upon these facts being left to the jury by his Honor, was found guilty, and appealed.

Boyden, for the defendant, contended, that the old road was not altered; that the requisites of the act of 1834 were not complied with in several particulars, all which the public interest required should be strictly observed; that the defendant's being the magistrate who called upon the freeholders, could make no difference: that the Court did not intend that there should be two roads; and, as the old one was not changed, it could be no nuisance to obstruct the new one. The counsel also objected to the proceedings, as too indefinite, and therefore inoperative to effect a change of the old road.

The Attorney-General, for the state, contended, that though the proceedings might be irregular, yet being before a Court having jurisdiction of the subject-matter, the order of the Court establishing the new road was valid, until the proceedings were rescinded or reversed.

GASTON, Judge: The question presented in this case is, whether the evidence submitted to the jury was sufficient in law to show that the way obstructed by the defendant was a public road. (His Honor here stated the facts of the case as above, and proceeded as follows): The County Courts of this state have full power to order the laying out of public roads, where necessary; to discontinue such roads as shall be found useless, and to alter roads so as to (549) make them more useful, as often as occasion shall require. Before the passing of the act of 1834, (see 1 *Rev. Stat.* c. 104, sec. 7) the mode of proceeding directed to be pursued on an application to turn or alter an existing road,

was as follows. The applicant was required to file his petition in writing, and to give notice thereof to those over whose lands the road might pass. If the Court, upon hearing of the petition, approved thereof, a jury of freeholders was to be summoned, who should upon oath lay off the road to the greatest advantage of the inhabitants, and ascertain the damage which individuals might sustain thereby, and report their proceedings of the Court. Upon this report being confirmed by the Court, and upon the overseer certifying, or (if *he* refused to certify) upon the Court being satisfied from the report of commissioners by the Court for that purpose appointed, that such new or altered road was in good and sufficient order, the road laid off by the jury became the public road, instead of the old one.

In the session of 1834-5, an act was passed by which it is enacted, than any person through whose farm or land a public road passes, may turn or alter the same by laying off the road as he proposes, so, however, as not to interfere with the land of any other person, and put it in a good and proper condition as a public highway: but before he shall close up, or in any manner obstruct, the former road, he shall apply to a justice of the peace, whose duty it shall be to summon two disinterested freeholders, to attend on the premises on a given day, who after having taken an oath to that effect, shall with himself, view and examine the road as proposed to be altered or turned, and report its condition, and such other facts connected with the case, as may be necessary to determine whether such alteration should be made, to the next Court of Pleas and Quarter Sessions, to be held for the county; and upon consideration of such report, the Court may sanction the proposed alteration, or refuse it; provided, that the overseer of the road shall have five days notice of the time, and place of meeting, of the justice and freeholders. If the
(550) case before us involved only the inquiry, whether the proceedings exhibited by the record, conformed to the requisitions of the act, it would be an inquiry free from difficulty. In the first place, we hold it to be clear, that the act applies *only* where the road proposed to be changed, as well as that offered to be substituted for it, are wholly within the farm or upon the land of the petitioner, so that no individual is likely to receive injury from the change; but the

sole question is, whether the prayer of the petitioner may be granted without inconvenience to the public. As the change is not to interfere with the land of any other person, notice to the overseer, the official guardian of the public convenience was deeemed sufficient, and as such a change must, in general be inconsiderable, it was supposed that the trouble and expense of a jury might safely be dispensed with.

On the face of these proceedings, it does not appear that the road intended to be shut up passed wholly, or in part, through the land of Bitting, and it does appear, that the road intended to be in lieu of it, did not pass wholly through his land. Besides, the express requirements that the freeholders should be sworn, that they and the justice should view the proposed road, and report its actual condition, and that the overseer should have five days previous notice of such view, most important requirements in behalf of the public, are essential and must not be neglected. But the question for us is not, whether upon such irregular and defective proceedings, the Court ought to have sanctioned the change of the road, nor whether the order for such a change ought not to be set aside, but whether, upon the record offered, the road has been changed as alleged. Acts formally done by a tribunal which has power to do them—however voidable because of error or irregularity—are valid, until they be formally avoided. The alteration of roads, is a subject over which the County Courts have full jurisdiction, and every altered road, declared by them to be a public road, must, until such declaration be rescinded or reversed, be regarded by every citizen as a public road. It is enough that the way obstructed is a public road *de facto,* to constitute the obstruction of it a public nuisance. Upon the best (551) consideration which we have been able to give to these proceedings, we are of opinion, that they do not show an adjudication of the Court by which this private way has been made a public road. If there be any such, then the old road has been discontinued, and may be lawfully stopped, for the subject matter of the adjudication was not the laying off of a new, but an *alteration* of the existing road. If there be such, it is not express, but to be inferred from the confirmation of the recommendation, and the ordering of that recommendation to be filed. Now, if this document had set forth

that the way as proposed to be turned, had been laid off and put into a good and proper condition for a public highway, and had described with reasonable certainty, the road so laid off and put in order, the confirmation of such a report might be deemed an adjudication establishing the proposed alteration. But in these respects it is utterly insufficient. It states no road as having been prepared; it describes, not where the altered road is to run, except that it is to be brought nearer the house of Bitting; and it prays only that an order may be made "for turning the road." The Court is not thereby called upon to sanction or refuse any specific alteration, and its approbation of the prayer in this document, cannot be considered as a sanction of a specific alteration. It ought to appear upon the face of the record, that the Court was not only willing, that a change of the road might be made, but had definitely accepted and established a new, in the place and stead of the old road. The public convenience is too deeply concerned in matters of this kind to permit us to *infer* a solemn adjudication from such loose, defective, and uncertain proceedings. The right of the public in the old highway is not to be taken away thus lightly.

If the transaction which we are considering had been an old one, and the former road had been shut up, and the new one accepted by the community with the acquiescence of the defendant, before the obstruction complained of, the case might have presented a different aspect. Under such circumstances, perhaps, it might have been held, that the de-

(552) fendant had dedicated his land to the use of the public as a highway, and that he was guilty of obstructing a highway *de facto*. But the evidence offered upon the trial did not, in our opinion, warrant a finding that the way obstructed was a public road. The judgment is to be reversed, and a new trial ordered.

PER CURIAM. Judgment reversed.

Cited: State v. Davis, 68 N. C., 299; *State v. Smith,* 100 N. C., 554.

STATE v. MATHEW MILLS.

1. A *scire facias*, reciting that the defendant "was lately bound in a recognizance, in, &c., for the appearance of T. S., at, &c., that the said T. S. failed to make his appearance, as *he* was bound to do; and that it was thereupon ordered by the said Court, that *he* forfeit his recognizance, according to law," and commanded the sheriff to make known, &c., is irregular, uncertain, and defective. And although the objections to it cannot be taken upon a plea of *nul tiel record*, a *cassetur* is the only proper judgment.

2. A recognizance is a debt of record, and is of the nature of a conditional judgment, which the recorded default makes absolute, subject only to such matters of legal avoidance as may be shown by plea; or to such matters of relief as may induce the Court to remit or mitigate the forfeiture; and the object of a *sci. fa.* is to notify the cognizor to show cause why the cognizee should not have execution, of the sum acknowledged. The act of 1777, (*1 Rev. Stat. c 35, sec. 32,*) makes it *imperative* that the *sci. fa.* shall issue and judgment be had thereon, previous to suing out execution upon a forfeited recognizance. But no *judgment* of forfeiture is thereby required before the issuing of the *scire facias*.

This was a *scire facias,* which, after reciting that the defendant was lately bound in a recognizance in the sum of five hundred dollars, for the appearance of Theophilus Stubblefield, at Spring Term, 1837, of the Superior Court of Rockingham; that the said Theophilus failed to make his appearance, as *he* was bound to do; and that it was thereupon ordered by the said Court, that *he* forfeit his recognizance, according to law, commanded the sheriff to make known to the defendant to appear at the next succeeding term, and show cause why the said forfeiture should not be made absolute. The defendant pleaded *"nul tiel record."* The solicitor for the state showed a separate recognizance entered into by defendant for the appearance of Stubblefield at Spring Term, 1837, of Rockingham (553) Superior Court; also the record of that term, in which was the following entry: "State v. Theophilus Stubblefield. Theophilus Stubblefield called and failed. Judgment nisi."

His Honor *Judge Saunders* sustained the defendant's plea, and rendered a judgment in his favor: from which Mr. Solicitor *Poindexter* appealed.

The Attorney-General, for the state.
J. T. Morehead, for the defendant.

GASTON, Judge: The *scire facias* in this case, and the proceedings upon it are so irregular, defective and uncertain, that we think the only proper judgment for this Court to render is, that the same be quashed. (His Honor here stated the case as above, and proceeded):

The *scire facias* is defective, in not setting forth the recognizance fully—to whom, or where made; and that the same is of record in the Court from which the *sci. fa.* was sued out. It is defective and uncertain, in setting forth that Stubblefield failed to appear, as *he* was bound to do; instead of averring that Stubblefield failed to appear at the Court, when and where, according to the condition of the defendant's recognizance, the said Stubblefield was to make his appearance. It is irregular, as well as uncertain, in setting forth that it was ordered that *he* should forfeit his recognizance, and requiring of the defendant to show cause why this forfeiture should not be made absolute. What record was denied by the defendant's plea, we are unable to ascertain; for there is no averment in the *scire facias* of any record. If it denied the recognizance, then the judge erred in adjudging that there was no such record; for the case shows that a recognizance of record corresponding with that described in the *scire facias,* (so far as a recognizance is therein described,) was exhibited to the Court. If it denied the "order" that either Stubblefield or the defendant should forfeit his recognizance, there was no error in finding the plea true; but the plea, so understood, was no defence against a proper (554) *scire facias.*

A recognizance duly entered into is a debt of record, and the object of a *scire facias* is to notify the cognizor to show cause, if any he have, wherefore the cognizee should not have execution of the same thereby acknowledged. In England, before our Revolution, when a recognizance was acknowledged, with condition to be void upon the appearance of the cognizor or any other person in Court, and the party did not appear, the default was recorded; and thereby the recognizance became absolute or forfeited; and being *estreated* (that is to say, taken out of the other records), and sent up to the Court of Exchequer, the King, upon an affidavit of danger of losing the debt, and on the fiat of one of the barons, might have an immediate extent against the

body, goods and lands of his debtor. But the ordinary mode was to sue out a *scire facias* thereon. Our act of 1777, (see 1 *Rev. Stat.* c. 35, s. 32,) has made it *imperative,* that before suing out execution on a forfeited recognizance, a *scire facias shall* issue, and judgment be had thereon. But no *judgment* of forfeiture is thereby required previous to the issuing of the *scire facias.* The recognizance is of the nature of a conditional judgment, and the recorded default makes it absolute, subject only to such matters of legal avoidance as may be shown by plea, or to such matters of relief as may induce the Court to remit or mitigate the forfeiture.

PER CURIAM. Proceedings quashed.

Cited: State v. Smith, 66 N. C., 621.

(555)

STATE v. HENRY HUMPHREYS.

The act of 1816, (*Rev. c. 900,*) relates to the former one of 1809, (*Rev. c. 770,*) and the scope of both acts, or of the act of 1816, construed in reference to that of 1809, is to make it an indictable offence to issue, pass or receive small notes, checks or due bills as a substitute for money. Hence the *intent* that a note issued should pass current as a substitute for money, or that in fact it was so issued and passed, is an essential ingredient of the offence, and must be averred in the indictment and proved on the trial.

The acts of 1809 and 1816, prohibiting the issuing and circulation of small promissory notes or due bills as money, are not unconstitutional.

The defendant was indicted and tried at Guilford, on the last Circuit, before *Saunders, Judge,* as follows:

"The jurors for the state upon their oaths, present that Henry Humphreys, late of the county of Guilford, laborer, on the tenth day of October, A. D. 1837, with force and arms in the county of Guilford aforesaid, did issue a certain bill commonly called a due bill, in the words, letters and figures following, that is to say:

'25 25

Mount Hecla Steam Mills, North Carolina.

The proprietor of the Mount Hecla Steam Cotton Mills,

promises to pay the bearer on demand, twenty-five cents in current money.

H. HUMPHREYS, Proprietor.'

Greensboro, 10 Oct., 1837.

with intention to evade an act of assembly, passed in the year 1816, entitled an act supplemental to an act to prevent the circulation of small promissory notes, or due bills, against the form of the statutes in such cases made and provided, and against the peace and dignity of the state."

There was another count in the indictment, charging the defendant with issuing "a certain promissory note, commonly called a due bill," &c., plea not guilty. In support of the indictment, it was proved that the signature to the due bill was in the handwriting of the defendant; that he was the proprietor of the Mount Hecla Steam Cotton Mills; and that he resided, and the mills were situate in the county of Guilford; and further, that the bill was received (556) from a third person in change, as twenty-five cents.

His Honor charged the jury, that if they believed the facts and circumstances as above stated, they were authorized to infer that the bill had been issued by the defendant; and that if they were satisfied of that fact it was their duty to convict. The defendant was found guilty; whereupon his counsel moved for a new trial, for misdirection, which was refused; he then moved in arrest of judgment, because of the unconstitutionality of the act of assembly, under which the defendant was indicted. This motion was also refused; and a judgment being pronounced for the state, the defendant appealed.

W. A. Graham, for the defendant.
The Attorney-General, for the state.

RUFFIN, Chief Justice: The securities within the purview of the act of 1809, (*Rev. c.* 770,) "to prevent the circulation of small promissory notes or due bills," are such notes or bills for a less sum than ten shillings, as are "intended to pass current as a representative of, or a substitute for money." The subsequent act of 1816, (*Rev. c.* 900,) is supplemental to the former, as declared in its title; and

the preamble and also the enactments render it manifest that the latter statute is, as respects due bills, relative to that which preceded it. Though in itself imperfectly expressed, it is obvious it did not mean to prohibit a person from giving a note or due bill for a real debt, or to prohibit the payee or holder from assigning and passing such a note, as other negotiable instruments. Indeed, the second section uses the words, "in circulation;" from which and the enactments and recitals, generally, enough is seen to satisfy us, that the species of security, called due bills therein, and intended and expected to be suppressed by the penalties, in addition to "those of the act of 1809," and by the "further remedy" of indictment, is the same which is described in the act of 1809. The scope of both acts, taken together, or of the latter, construed in reference to the former, is to make it an indictable offence to issue, pass or receive notes, checks or due bills for small sums, to be used as change or as a part of the circulating medium instead of coin, or such paper as (557) the state has authorized or might authorize. The intent that a note issued should so pass current, as a substitute for money, or that in fact it was issued, and passed as such substitute, is therefore an essential ingredient of the offence; and must be averred in the indictment, and proved on the trial.

Neither the evidence on the trial, nor the instruction to the jury, is in conformity with this construction of the statute; and consequently, the judgment is deemed erroneous by the Court. It is possible that the inspection of the instrument itself, might have been sufficient to enable a jury to infer the intention, as if it were an impression from a plate, with vignettes and numbers, or the like, thus indicating that the particular paper, was one of a numerous series, issued or about to be issued. But no circumstance of the sort is stated in the case; and for aught that appears, this may have been the only paper issued or contemplated, and been given to some person for an existing debt, and without any purpose that it should be put into circulation as, or for money. If there was such a purpose, it is susceptible of easy proof, by showing that many such papers had actually been issued by the defendant, and were circulated with his privity or in his vicinity; which would denote the intent, in the same manner

as it has been held that the possession of a large quantity of base money unaccounted for, is evidence of an intention to utter it. But, whatever the evidence might have been on the trial, the verdict could not stand, because the Court excluded all inquiry into the intention, and directed a conviction upon evidence of the issuing simply of this single note or bill.

The disposition of the verdict renders it unnecessary to consider the motion in arrest of judgment. Yet it may be remarked that for the reason, which in the opinion of the Court renders the instruction to the jury erroneous, the indictment is also defective. It is proper, however, that the Court should not leave in doubt, the opinion entertained upon the objection in arrest, which is stated in the record; namely, that the statute is unconstitutional. If an act of which the object and operation is so very salutary, were in violation of the Constitution, it would be the source
(558) of sincere regret. But the Court is at a loss to conjecture on what ground the position is taken. It is, and must be, an attribute of every government, in some department, to prescribe and regulate the currency; to protect the community, from that which is spurious or worthless, whether it be of coin or paper; and to prohibit the making of such contracts, as are contrary to good morals, or contravene public policy; and there is no provision of our own Constitution, or that of the United States, in restraint of such action of the legislature, as may be directed against the fraud and swindling which would be prevalent, if every person at his will could throw into circulation paper trash of this kind.

PER CURIAM. Judgment reversed.

EDMUND CLAYTON v. The next of kin of SARAH and MARTHA LIVERMAN.

A paper writing executed by two persons, making, after both their deaths, a joint disposition of all their property, cannot be admitted to probate as a mutual or conjoint will. And it was *Held*, DANIEL, Judge, dissenting, that such a paper writing could not be proved as the separate will of either of the supposed testators, because it *purported* to be a *joint*, and not a *separate*, will; and because it implied, from its structure, an agreement between them, which was inconsistent with its revocability, and therefore prevented its operation as a will.

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CLAYTON *v.* LIVERMAN.

This was an issue of *devisavit vel non,* as to a script propounded as the will of Sarah and Martha Liverman. The script was in the following words, viz.:

"In the name of God, Amen. July the 6th day, 1832. I, Martha Liverman and Sarah Liverman, of, &c. We, being in a good state of health, and of sound mind and memory; and calling to mind the mortality of our body, and that it is appointed for all mortals once to die, do make this to be our last will and testament: and first of all we commend our souls to the hands of Almighty God that gave it; and as touching such worldly goods as it hath pleased God to bless us with, we devise and dispose of in the following manner: First, we give unto our dearly beloved (559) nephew, William Clayton, one negro man," &c., "after our decease, to be and remain his and his heirs forever, to his proper use. Then we give unto our dearly beloved nephew, Edmund Clayton, one negro man, &c., and we do hereby give unto him all the rest of our property, after our decease, to be and remain his and his heirs forever, to his proper use; and we do hereby ordain and appoint our worthy friend, Edmund Clayton, executor of this our last will and testament."

The probate was contested by the next of kin; and the issue was tried on the last Circuit, at Tyrrell, before His Honor *Judge Pearson,* when it appeared in evidence that the supposed testatrixes, who were sisters, both died within a few days of each other.

For the next of kin it was objected, that a mutual or conjoint will was unknown to the testamentary law of this country. To obviate this objection, the paper writing was propounded as the joint will of both the supposed testatrixes, and also as the sole will of each of them; and it was agreed, that if in any of these forms it could be admitted to probate, it might be admitted to be so pronounced for. His Honor thinking that probate might be had of it as a mutual or conjoint will, it was proved in that form; and the caveators appealed.

Devereaux, for the defendants.
Heath, for the plaintiff.

GASTON, Judge: This is a very singular case, and presents for determination, questions, which, as far as we are informed, have not before been agitated in our country. These are, first, whether the paper writing offered for probate, and found to be jointly executed by Martha Liverman and Sarah Liverman, can be admitted to probate as the joint will of the said Martha and Sarah: and secondly, if it can not be admitted to probate as their joint will, may it be proved as the separate will of either of them.

The paper professes, as strongly as language can declare, to be the united will of Martha and Sarah Liver-
(560) man; designed to take effect upon the death of both; to appoint an executor to both; and to dispose of property belonging to both. "We do make this to be our last will and testament. We commend our souls to the hands of Almighty God that gave it—as touching such worldly goods as it has pleased God to bless us with, we devise and dispose of it in the following manner: We give unto our dearly beloved nephew William Clayton, one negro man, &c., after our decease, to be and remain his forever. We give unto our dearly beloved nephew, Edmund Clayton, one negro man, &c.; and all the rest of our property, after our decease, to be and remain his forever. We do hereby ordain and appoint our worthy friend Edmund Clayton executor to this our last will and testament." These expressions can leave no doubt that it was the purpose of both parties to this instrument, that after they should die, the property therein mentioned should be disposed of in the manner stated; and that Edmund Clayton, as their executor, should see these dispositions carried into effect. It is a conjoint will, if a conjoint will can in law be made.

Can it be established as a joint will? I have no hesitation in answering this question in the negative. A will is defined to be a legal declaration of a party's intentions, which he wills to be performed after his death. It follows, from the definition, that it must be the sole act of *one* person, declaring *his* intentions, in regard to what *he* wants performed, when he shall be no more. It is the exercise of a privilege which belongs to the owner of property, of declaring a law for continuing that property in such persons as he pleases after his death. Deriving its efficacy solely from its being his final

sentence; inoperative during his life; and having exclusively a posthumous character, it remains ambulatory and revocable up to the last moment of his existence, and *then* becomes, by virtue of his definitive determination, a positive and absolute rule. In this view a will differs essentially from a deed; and therefore the first deed, but the last will, is of the greater efficacy. So long as a man retains a testable capacity—and without a testable capacity he can make no will—
he may alter, abrogate, or republish his will. It is not (561)
in his power to make a will which he may not alter or
revoke, because no man's act can "alter the judgment of law to make *that* irrevocable, which is of its nature revocable." *Vynior's Case,* 8 Coke, 162. Swin. Pt. 7, sec. 14, pl. 2. From these properties of a will, it also follows, that it cannot be conjoint. If conjoint, it is to take effect after the death of both, not upon the death of one. If conjoint, then it is either irrevocable except by the act of both—which would deprive each testator of the power of altering his intentions in regard to the disposition of his own property—or it is revocable by the act of either, which would give to one the power of changing the disposition of another's property. In Williams on Executors, vol. 1, p. 9, we find it laid down, "Another essential distinction between a deed and a will may be mentioned, that there cannot be a conjoint or mutual will; an instrument of such a nature is unknown to the testamentary law of this country." For this the author quotes 1 Cow., 268, in *Lord Mansfield's* judgment in *Darlington v. Pultery. Hobson v. Blackburn,* 1 Addam's Eccl., 277; and he is fully supported by his references.

Perfectly satisfied that the paper writing propounded cannot be admitted to probate, as the joint will of Martha and Sarah Liverman, I am next called upon to decide whether it may be established as the will of either of them, and in my opinion, this question must also be answered in the negative. An insuperable objection in the way of pronouncing this the several will of either of the parties is, that it does not *purport* to be the separate will of either. It is wholly a joint act, and in no respect a several act. It is a joint declaration of a joint purpose as to the disposition of joint property, after the death of both the parties, by a joint executor, appointed to carry into effect this arrangement; but it contains no

declaration of the separate intentions of either in regard to her property, to be executed at her death, nor the constitution of any executor to carry into effect her intention. To pronounce for it as a several will, is to adjudge it to be what it is not.

It has been insisted in argument, that as the in-
(562) strument contains unequivocal evidence of the intention of both, it necessarily shows the intention of each of the parties; and therefore is the will of each. Assuredly each did intend the disposition contained in the supposed will, such and in the form therein declared, but it does not thence follow, that either definitely intended such a disposiiton of *her interest* therein, after *her death.* It does not conclusively appear, that if either had made a separate testament such testament might not have contained a different disposition. If from the joint declaration, we are to form any *inference* as to the separate purpose of each, I should conclude, that at all events, it was designed that the survivor should take for the term of her life, the property of the other. In this respect, at least, the will of each would have varied in *terms* from that before us. It would have varied also in its *operation.* For if this be held the separate will of each, then, upon the death of one, her whole interest devolved upon her executor, in trust for the legatees therein named, after the death of the other, and, until that event, in trust for the next of kin of the deceased. Besides, *non constat,* but for the purpose of carrying into execution the joint arrangement wholly, and in the form agreed upon, an entirely different disposition would have been made. Both purposed that the legatees should take the respective things given, and as they were given, but neither may have desired that they should take, at all events, an undivided moiety thereof. It may have been, that the arrangement contemplated, was, as a whole, deemed well suited to the interest, advancement, and comfort of the common family of the parties, and may have accorded with the feelings which they entertained towards the human beings who constituted the principal part of the subject of this arrangement, while the same considerations might have prompted each, in making an independent will, to select different legatees, and to bequeath in a different way. But it is not necessary that we should see a separate purpose, dif-

ferent from that evidenced by the joint act; it is enough that the joint act contains no definitive evidence of the separate purpose of either.

Although no instrument has operation as a will until the death of the testator, yet if it be not valid as a (563) testamentary instrument when executed, no circumstances occurring afterwards, (short of a republication by the testator,) can make it such. The determination, therefore, of the question, whether this be the separate will of one of the parties, must be the same as it would have been, if the other were yet alive, or had died after revoking this instrument as her will, and making a different testamentary disposition of her property.

Another, and, as I think, equally insuperable objection to the probate of this instrument as a will, is, that whatever name may be given to it by the parties, it is, on its face, an agreement or compact; and cannot, therefore, be a will. Upon the face of the instrument, there is manifestly an agreement between two, for the disposition of the property of both. It declares the assent of two minds to one common purpose, which neither was individually competent to effect; and it is, therefore, a compact. Now, it is immaterial in what *form* a will is made, whether it be in form of a deed-poll, indenture, marriage settlement, bond, letter, note, draft, receipt or endorsement, provided, that it evinces the fixed independent purpose of an individual, with regard to the disposition of his property after his death. So, an instrument, testamentary in its form, if it manifests no more than a compact, or an agreement between two, must be treated as such, and cannot be converted into an instrument testamentary in its *character*. It does not become us to say whether this agreement or compact, be well executed, and if not, whether it be one the execution of which, could be enforced by either of the parties, or can now be enforced by those who were to derive benefit from it. How it may be considered, when brought before the proper forum for the adjudication on agreements or compacts, a Court of probate is not competent to inquire. When such a Court sees that it declares the agreement of two, and not the separate volition of one, a conclusion in which an interchange of opinions, and a compromise of interests has resulted in regard to a subject exclu-

sively belonging to neither; and not the spontaneous determination of one claiming to exercise sole dominion; (564) such a Court cannot pronounce it the will of either.

To use the language of *Lord Rosslyn,* in *Warner v. Matthews,* 4 Ves. Jun., 209, it is not a complete definite rule and law made by the owner for the settling of her fortune after death.

I rely with more confidence on the correctness of this opinion because it has the sanction of one of the ablest judges on testamentary law. The case of *Hobson v. Blackburn,* 1 Addams, 274, (2 Eng. Eccl., 115,) is strikingly similar to that before us. Martha, Susanna, and Joshua Hobson, sisters and a brother, executed an instrument in writing, which, in the beginning, they called an assignment, but, in the end, expressly declared *their will,* "in the case of each other's decease." By it, provision was made upon the death of one, for the benefit of the two surviving, and upon the death of two, for the benefit of the last survivor, with limitations thereafter to their other brothers and sisters, and they thereby constituted each other with their brothers, William and George, executors thereof. Joshua died, and a probate of this instrument as his will was granted to his two sisters, Martha and Susanna, and his brother George, three of the executors therein named. Martha afterwards died, having made, as was alleged, a separate testamentary disposition of her property. Probate of the joint will as the will of Martha, deceased, was prayed by George Hobson, one of the surviving executors therein named: and letters of administration, with the separate will annexed as that of the same deceased, were prayed by her nieces who were legatees in it. The allegation propounding the joint will was in the common form, *except that it pleaded the death of Joshua Hobson, and that probate of the said joint will as to the effects of the said Joshua had been taken by the deceased.* The admission of this allegation was opposed. *Sir John Nicholl* declared that he had no hesitation whatever, in rejecting the allegation propounding the *joint* will, as that of the party deceased, on the principle that an instrument of this nature is unknown to the testamentary law of this country, or in other words, that it is unknown as a will to the law of this country at all. "It may," he observes, "for aught that I know, be

valid as a *compact.* It may be operative in equity, (565) to the extent of making devisees of the will, trustees for performing the deceased's part of his contract. But these are considerations wholly foreign to this Court, which looks to the instrument entitled to probate as the deceased's *will,* and to that only. The allegation plainly proceeds upon a notion of the irrevocability of the instrument which it propounds as the *will* of the deceased. Why, this very circumstance destroys its essence as a will, and converts it into a *contract,* a species of instrument over which this Court has no jurisdiction. Upon these broad, and, as I apprehend, sufficiently intelligible grounds, I reject this allegation."

The counsel for the plaintiff, in commenting upon the case of *Hobson v. Blackburn,* insists that it decided no more than that, as the will of Martha Hobson, it was revocable, and had been in fact revoked by her testamentary disposition of a subsequent date. Certainly I do not so understand it. According to the practice in the Prerogative Court, (see note page 11 of 1 Eng. Ecl.) the facts intended to be relied on in support of any contested suit, are set forth in a plea which is termed an allegation. This is submitted to the inspection of the counsel of the adverse party, and if it appears to them objectionable, either in form or substance, they oppose the admission of it. If the opposition goes to the substance of the allegation, and it is held to be well founded, the Court rejects it; by which mode of proceeding, (analogous to that of a demurrer to a bill in equity,) the suit is terminated without going into any proof of the facts. The case was heard on opposition to the admission of the allegation propounding the joint will as the separate will of the supposed testatrix, and not upon the allegation propounding the subsequent will. The allegation opposed did not bring the question as to the execution of the subsequent testamentary paper before the Court. The sufficiency of the allegation opposed was the sole matter, then under consideration and the allegation was rejected not because the will propounded had been revoked, that would be a matter for subsequent inquiry, if the allegation should be admitted, but because the instrument so propounded as the will (566) of the deceased, was a conjoint or mutual will, and, therefore, *as a will,* entirely unknown to the law. The only

remark respecting the "notion of its irrevocability," was to explain more distinctly the reason why a conjoint will was unknown to the testamentary law. Such an instrument is regarded as a compact. Compacts are not wills and differ from them, (besides in many other important particulars,) essentially in this, that compacts (if valid) are irrevocable, while wills are revocable.

The counsel has also remarked, that in the case decided by *Sir John Nicholl,* as also in the case of *Dufour v. Percira,* Dickens, 419, probate was in fact granted on a joint will, as the will of the testator who died first, and he insists that this is some evidence, that the words of that learned judge are not to be understood in the broad sense attributed to them. I think, that the probates thus granted, without contestation and *sub silentio,* afford no evidence to this purpose. The mode of proceeding was no doubt, by what is called a *simple condidit,* setting forth the execution of an alleged will, and the sanity of the testator, and did not bring to the notice of the Court, the *joint* character of the instrument propounded.

The cases of *Dufour v. Percira,* 1 Dickens, 419; *Walpole v. Oxford,* 3 Ves. Jun., 402, and *Hinckley v. Simmons,* 4 Ves. Jun., 160, are cases in which conjoint or mutual wills have been set up, or attempted to be set up in equity, not as *wills* but as *compacts,* and need no further explanation than that given in the judgment of *Sir John Nicholl,* already stated.

In my opinion, the judgment below must be reversed. As the verdict was general, and not rendered subject to the opinion of the Court, upon the legal objections taken upon the trial, we can do no more than reverse the judgment, and order a *venire de novo.*

RUFFIN, Chief Justice: I fully concur in both the reasoning and conclusions found in the opinion of *Judge Gaston.*

DANIEL, Judge, dissented, and delivered the fol-
(567) lowing opinion: The decision made by the Court below, that this paper writing could be admitted to probate, as a *joint* will of the two sisters, I am inclined to think was erroneous. But I am unable to perceive, why it may not

be admitted to probate as the separate and several last will and testament of each of the two sisters. It seems to me, that they have separately and severally, executed this paper as the last will of *each* of the underwriters, so far as relates to that portion of property which belonged to each, and which is mentioned and attempted to be disposed of, by this testamentary writing. The sisters do not even pretend to make a mutual will of their property to each other; or make any agreement express or implied, that the survivor shall have the property of the first deceased, during the life of the survivor. They both together, or either separately, had the power to revoke or alter this will; either might have revoked, without giving notice to the other of the fact of revocation. Then it would have stood as the will only of her that had not revoked. There is no agreement to be seen or implied in the case, that if one of the sisters would sign the will, or dispose of her property in this manner to the legatees, the other would; or if one should revoke, the other would, or probably would, have altered her will. I say there is no such agreement; it is not, therefore, a case in which a Court of Equity, could have entertained any jurisdiction, if one of them had revoked secretly. It is a case resting entirely upon the testamentary law of the land, which does not require any notice of revocation to be given. Why should the will of these two sisters be here frustrated, and the legatees disappointed? The law favors last wills and testaments; and it seems to me, that in establishing this paper as the separate will of each of the sisters, no principle of law or policy, can or will be violated. Because the case is a novel one, it by no means follows that the claims of the plaintiff are illegal. What is the *test* by which we learn whether a paper is a will or not? A last will and testament is defined to be "the just sentence of our will touching what we would have done after our death," 2 Bla. Com., 499; Swinb. Pt. 1, sec. 2. 1 Will. Exrs., 6. Trying this paper by this test, can (568) any man doubt but that it is a will and testament?

But it is said, that the paper contains an agreement, and therefore, its revocability as a will was destroyed, and by the testamentary law it could not be considered as a will. I deny the fact that the paper contains any agreement; therefore the Court of Equity has nothing to act upon. And

again, I deny that the law of a Court of Probate would reject it as a will, even if it did contain an agreement, if it also contained the just sentence of the will of the sisters, touching what they would have done after their deaths. Such a paper would still be a will; and, although it were in the form of an agreement, it would be revocable by either of the sisters in their lifetime, by force of the testamentary law. The Court of Equity by its extraordinary power, and to prevent frauds, might restrain the revocation, or declare a revocation of it in the Court of Probate a nullity. But can a judge sitting in a Court of *Probate* do so? I answer, no. *Dufour v. Percira,* 1 Dickens, 419, was this: A wife had a separate estate: she and her husband agree to make a mutual will, which is drawn, and both execute it. The husband died; the wife proved the paper writing in the prerogative Court as his will, and afterwards *she* made another will. And the question was, whether in a Court of *Equity,* the wife should be permitted to revoke the mutual will. (It was not doubted, I think, but in a Court of Probate she might revoke). *Lord Camden, Chancellor,* said, "Consider how far the mutual will is binding, and whether the accepting the legacies under it by the survivor, is not a confirmation of it. I am of opinion it is. It (the will) might have been revoked by both jointly; it might have been revoked separately, provided the party intending it, had given notice to the other of such revocation." *Lord Camden,* was evidently alluding to the law of a Court of Equity, when he said, "provided the party intending it, had given notice of revocation;" for without such notice a fraud might have been committed on the other party, which a Court of Equity would relieve against. But in a Court of Probate (when the jurisdiction is not extraordinary, like it is in chancery, where the Court applies to the con-
(569) sciences of the parties), the law of the Court is, that all wills however made, are revocable at any time before the death of the persons making them; and that, too, without notice to anybody. And it is because a Court of Probate cannot look at the instrument in the light of an *agreement,* as a Court of Equity can; but must only consider whether the paper is testamentary in its character, and if it is, to enforce the law of that Court, which says, that a will is *ambulatory* and *revocable* at any time before the death of the

maker. It is, because of the inability of the Probate Court, to give the proper relief, that we discover certain cases are brought before the Court of Equity, where they are acted on as *agreements.* In the case of *Dufour v. Percira,* there cannot be a doubt, but that the paper would have been admitted to probate in the Prerogative Court, as the will of the wife, as well as it had been already admitted to probate, as the last will of the husband, had not the wife made another will, which operated in the Prerogative Court according to the laws of that Court, as a revocation of the mutual will, so far as the same related to the wife. The Prerogative Court was bound to establish the last will of the wife, and consider the mutual will as revoked, so far as concerned the wife. But equity stepped in, and by its extraordinary power touched the consciences of the parties, and prevented fraud and imposition. *Lord Camden,* said, "the first (the husband) that dies carries his part of the contract into execution. Will the Court of Equity afterwards permit the other to break the contract? Certainly not. The wife has taken the benefit of the bequest in her favor by the mutual will; and hath proved it as such. I am of the opinion, that the *last will of the wife,* so far as it breaks in upon (the agreement) the mutual will is void." There is no doubt but *Lord Camden* thought the mutual will would have stood good in the Court of Probate, as the separate and individual will of each, had it not been revoked, as to the wife, by the subsequent inconsistent will of the wife, and by force of the law of the Court of Probate. In *Walpole v. Oxford,* 3 Ves., 417, the *Chancellor* in speaking of the case of *Dufour v. Percira,* says: "there was no probate of the mutual will as the will of the wife (570) in the Ecclesiastical Court, it was considered purely as the will of the husband." I ask, why was not the mutual will proved as her will? The answer is, because her first will was revoked by the second, according to the laws of a Court of Probate. The Chancellor, therefore, had a right to say, after what had happened, that the mutual will neither was, nor by possibility could be the will of the wife. But it was in *equity* a good contract, and it should *there* be so understood and enforced, notwithstanding it was revoked as a will, in the Probate Court, by her subsequent will made and established in that Court. The case of *Hobson v. Blackburn,*

2 Eng. Eclesi., 115, simply lays down this principle: "That mutual or conjoint wills *irrevocable* by either of the supposed testators, is unknown to the testamentary law of this country." I suppose, that nobody ever doubted but that the law was as there stated. How could it be a last will, if it was not ambulatory and subject to revocation at any moment before the supposed testator's death? If we will but attentively examine the facts of that case, it will be made too plain to cavil about. Martha, Susanna, and Joshua Hobson (a brother and two sisters) each being worth about eight thousand pounds, in the year 1794 make a will, which stripped of its useless verbiage, is in this manner. "We, Martha, Susanna, and Joshua Hobson, do agree to the following assignment of our property in case of each others' decease: The whole of the interest of it shall devolve to the longest life or lives while continuing single," &c.; the will then proceeds to specify the property disposed of, and make ulterior limitations in case of the marriage of either or death of the survivor. They appoint each other executors and executrixes. Joshua Hobson died in 1796, and probate as to the effects of Joshua was granted by the Prerogative Court, to Martha and Susanna Hobson, as executrixes. In November, 1820, Martha Hobson made a *separate* will of her estate, which had increased to thirteen thousand pounds, inconsistent with the first mutual will of 1794. Probate of the joint will of 1794, as that of Martha Hobson, was prayed by one of the (571) executors named in that will, on the one hand, and those claiming under the separate will of Martha Hobson, of 1820, prayed probate on that at the same time, on the other hand. The two wills of Martha, viz., that of 1794, as well as that of 1820, were both presented to the judge at the same moment of time for probate. *Sir John Nicholl* did that, and no more, which every County Court in this state would have done in a similar case, he admitted the last will of Martha Hobson, (that of 1820,) to probate, or did not reject it, and rejected the will of 1794. *Sir John Nicholl*, speaking of the will of 1794, (as appears in the beginning remarks of his reported opinion,) does say, or is made by the reporter to say, "that an instrument of this nature is unknown *as a will* to the laws of this country at all." *Sir John Nicholl* was, as had *Lord Camden* been, in *Dufour*

v. Percira, struck at first, more from the novelty of the thing, than its difficulty: and in reading a little further on his reported opinion, we see the plain common sense grounds upon which he decided the cases. He there says: "The *allegation,* (propounding the will of 1794,) plainly proceeds upon the notion of the irrevocability of the instrument which it propounds as the will of the deceased. Why, this very circumstance destroys its essence *as a will,* and converts it into a *contract;* a species of instrument over which this Court has no jurisdiction. Upon these broad and intelligible grounds, I reject the allegation." For the substance of the *allegation* propounding the will of 1794, (which is the same as is the *declaration,* in an action at common law,) rested the case wholly on the notion of the irrevocability of the paper of 1794, under the circumstances in which it was made, and also after the fact of the death of the brother who had signed it, and its (the same paper) having been *before pronounced his will by the Court of Probate.* The *opposition* to the *allegation* made (which resembles a demurrer at common law,) brought the question of law upon the facts and averments made in the *allegation,* directly for the opinion of the judge. And, he very properly pronounced against the *allegation,* and particularly against the new-fangled notion of the proctor who framed it. Mr. Williams, (1 Exrs., 9,) seems to me to give rather the *dictum* of *Sir J. Nicholl,* in (572) *Hobson v. Blackburn,* upon an irrelevant point, than the true grounds of his decision upon the merits of the case. Certain it is that Mr. Addams, the reporter of the case, did not understand the judge to decide the case on the ground that Mr. Williams has stated he did. Mr. Williams, (in a subsequent part of the same volume, page 65, speaking as to conjoint and mutual wills being against law,) says, "one ground of objection to such an instrument as testamentary is, its *irrevocability,*" evidently hinging upon what *Sir John Nicholl* alluded as to the *allegation.* It appears to me that Mr. Williams, as well as my brothers in this Court, have entirely failed in comprehending the meaning of *Sir John Nicholl,* in his judgment in the case of *Hobson v. Blackburn.* The judge said that the *allegation,* propounding the will of 1794, plainly proceeded upon the notion of the *irrevocability* of the in-

strument, by the law of that Court. That position, the judge very correctly denied; and the reason that the allegation was not admitted, at least so far as to let the will of 1794 be admitted to probate, was upon no other legitimate ground, but that Martha had made the subsequent will of 1820, which had, in the Court of probate, revoked the will of 1794. I collect the fact that Mr. Addams so understood *Sir John Nicholl,* from his *synopsis* of the case; and, furthermore, from what is so plainly stated by the two Chancellors who decided the cases of *Dufour v. Percira,* and *Walpole v. Lord Oxford,* as the understood testamentary law of the Court of probate. If it was not the law of the Ecclesiastical Court, I am at a loss to conceive why the Court of Equity should be called on to restrain or give relief. It must be a demand upon the extraordinary powers of a Court of Equity, to have that justice done, which by the positive and stubborn law of the Court of probate could not be attained in that Court, or in other words, justice was likely to be frustrated by the rules of that Court. Can any man believe that if Martha Hobson had not have made the will of 1820, but that *Sir John Nicholl* would have admitted the mutual will of 1794 to probate, as her last will? We see, that the Prerogative Court (573) did not object to the form of the instrument when it was propounded and admitted to probate as the will of Joshua Hobson, the first of the three that signed it, that had died. So in *Dufour v. Percira*, the paper had been propounded as the will of the husband on his death, and admitted to probate as his will, although purporting to be the joint will of husband and wife. In wills only disposing of personal property, *form* is not looked at. It may be almost in *any form,* as is to be seen in the many forms noticed in Williams on Ex'rs, 54 and 55, provided it is the intention of the deceased that it should operate after his death. All the difficulty in this case, has arisen out of a *dictum* of *Sir John Nicholl,* in the case of *Hobson v. Blackburn.* He did not decide that case on it. The *dictum* is in conflict with the clearly ascertained notions of *Lords Camden* and *Loughborough,* as to what the law was, not in the Courts of Equity where they presided, but in the Ecclesiastical Court. There is neither reason nor policy, as it seems to me in favour of the *dictum.* Mr. Addams, unfortunately for these plaintiffs,

published the *dictum,* and Mr. Williams has propagated the error.

Whether the legatees, under the will of the sister *first* dying, would take immediate vested interests in their legacies, on the death of such *first* dying sister, or whether the said legacies would be executory and vest only on the death of *both the sisters,* is a question, the decision of which has no bearing upon the case now before the Court; which is, whether the paper shall be admitted to *probate* as containing the distinct and separate will of each of the sisters. Not until after the probate of a will, can any question arise as to the vesting or not vesting of legacies under that will. I think the paper contains the separate and distinct will of each of the two sisters who have separately subscribed the same; and ought to be admitted to probate as the several will of each of the subscribers.

PER CURIAM. Judgment reversed.

Cited: In re Davis Will, 120 N. C., 12.

INDEX.

ACCOMPLICE. See Evidence," 25, 26, 27.

ACCORD AND SATISFACTION. See "Dismission of a Cause."

ACCOUNT. See "Book Account."

ADMINISTRATORS. See "Executors and Administrators."

ADVANCEMENTS.

The second proviso to the third section of the act of 1806 (Rev. ch. 701) was prospective as well as retrospective in its operation; and slaves placed by their parents in the possession of their children, since that act, and remaining in the possession of such children, until the death of their parents intestate, are to be taken as advancements to the children. *Thompson v. Todd*, 63.

AGENT.

Where an agent had received money to pay off certain debts of his principal, and made a payment to the creditor, for which the principal was by mistake credited twice, such agent, in an action against him by the creditor to recover the amount of the mistake, cannot be rendered liable therefor, if it appears that he afterwards had a settlement with his principal, and paid over to him the balance remaining in his hands, after being allowed for only what he had actually paid the creditor. *Bank v. Robards*, 111.

ALIBI. See "Evidence," 6, 24.

ALIMONY. See "Divorce," 10.

AMENDMENT.

1. The Superior Court may in its discretion permit the plaintiff to amend his writ after a verdict in his favor, and the Supreme Court has no right to supervise the exercise of such discretion. *Alston v. Hamlin*, 115.

2. It is competent for the court, after a motion in arrest of judgment, to alter the record during the same term, by inserting into, or striking from the minutes, whatever may be necessary to make it when enrolled, speak the truth; and if, by such alteration, the grounds for a motion in arrest be removed, upon an appeal nothing can be looked to but the record in its completed state. *State v. Roberts*, 540.

APPEAL.

1. In a criminal prosecution, where, upon a conviction in the county court, the defendant appealed to the Superior Court, and in that court an order was made for the removal of the cause to an adjoining county for trial, it is too late for the State, when the cause is called, for trial in such county, to have the appeal dismissed for want of an appeal bond, especially where the defendant had been in custody ever since the conviction. *State v. Mitchell*, 237.

2. The Act of 1831, c. 34, allowing appeals to the Supreme Court from interlocutory judgments, does not alter the nature of the judgments to be reviewed, but only the time of that review. Nothing but errors in law can be examined on appeals to the Supreme Court. Hence an order giving the defendant time to plead, unless the plaintiff will consent to certain terms, is not the subject of appeal. *Bank v. Taylor*, 250.

APPRENTICE.

1. A covenant in an indenture of apprenticeship, under the act of 1769, (Rev. ch. 69, sec. 19, to teach the apprentice to read and write according to law, is not an engagement that the apprentice will or shall learn to read and write. And if the apprentice is incapable of acquiring the art of reading and writing, after proper means have been taken to teach him, the covenant is not broken. *Wyatt v. Morris*, 108.

2. The death of the master excuses the performance of the covenant for teaching, boarding, &c., required to be inserted in the indenture of apprenticeship: but if he covenant to do a collateral act, as to give the apprentice a horse, his executors are bound to perform it. *Goodbread v. Wells*, 476.

3. A master has the whole term of the apprenticeship to perform his stipulation to teach the apprentice; and if he dies without performing it, but so long before the expiration as to leave time for performance had he lived, no action lies for a breach of it. *Ibid.* 476.

ARBITRATION AND AWARD.

1. If arbitrators to whom a question is referred decline rendering a judgment, and only declare an opinion upon it; or if, mistaking the subject submitted, they adjudicate not on the controversy of title between the parties, but on the conflicting claims between one of the parties and a third person, the parties will not be bound thereby; because in the one case there is no award, and in the other it is not on the matttr submitted. *Alston v. Hamlin*, 115.

2. A letter written by the plaintiff, with the concurrence of the defendant, to two persons, calling upon them to say how he the plaintiff ought to dispose of certain slaves, which he had given since 1806, by parol, to his deceased daughter and son-in-law, between his granddaughter and the defendant, who had married another grand-daughter, that had died, is not a submission to arbitration of the plaintiff's *title* to the slaves in question; and no expression of opinion of the person called on, in what form soever made, can be obligatory upon the plaintiff's title to such slaves. *Ibid.* 115.

3. A covenant to submit a matter of difference to arbitration will bind the party to perform the award, although there is no express stipulation to that effect; and in an action upon the covenant, non-payment of the sum awarded may be assigned as a breach. *Simpson v. M'Bee*, 229.

ARREST OF JUDGMENT.

A motion in arrest of judgment cannot be sustained because it does not appear from the endorsement on the indictment that the witnesses were sworn before they were sent to the grand jury; for tbe judgment can be arrested only for matter appearing, or for the omission of some matter which ought to appear in the record, and those endorsements form no part of the bill. *State v. Roberts*, 540.

ARREST.

1. A constable cannot, under a warrant, nor by virtue of his office, make an arrest out of his own county, although under a reasonable belief that a felony has been committed, and that the person arrested was the felon. *Copeland v. Islay*, 505.

2. An arrest is an actual interference with the person, or a compulsory restraint of it. But these terms are not identical; and where an offi-

cer, having a warrant, went to the defendant, and informing him of the fact, said to him, "do you submit?" and he answered "certainly," and went with the officer before a magistrate, and there entered into a recognizance to answer the charge; *it was held*, to be such an arrest as amounted to an imprisonment of the person. *Mead v. Young*, 521.

3. In an action of trespass and false imprisonment for an unlawful arrest, it is admissible to prove that the plaintiff paid the defendant a certain sum of money on account of the transaction for which the arrest was made, in order to show the *animus* which influenced the proceedings. *Ibid.* 521.

4. Where a person went voluntarily before a magistrate, and while there, an officer, to whom a warrant against him for a criminal charge was directed, said to him, "there is a warrant against you; do you submit?" and he answered that he did, and then entered into a recognizance for his appearance to answer the charge specified in the warrant, *it was held* to be an arrest amounting to an imprisonment of the person. *Haskins v. Young*, 527. See "Sheriff,"—"Warrant," 2, 5.

ASSIGNMENT. See "Guaranty," 1, 3.—"Husband and Wife," 1.

ASSUMPSIT. See "Consideration," 1, 2, 3.

ATTACHMENT, No. 1.

1. A judgment rendered on an original attachment cannot be avoided or reversed, or treated as a nullity by a mere stranger, for error or irregularity in the proceedings upon which the judgment was rendered. *Skinner v. Moore*, 138.

2. Under sec. 65 of the Act of 1777, (Rev. c. 115,) the county in which an attachment should issue, returnable to the county court, is the county from which the debtor has removed, or is removing himself privately; and if it be issued, and returned to the county court of any other county where the debtor may have property, it may be abated by plea for want of jurisdiction as to the person; but if no such plea be put in, and the creditor obtains a judgment for his debt, the same being within the jurisdiction of the county courts, such judgment will be valid and conclusive. *Ibid*, 138.

3. By our attachment law, a judgment obtained upon a proceeding in an original attachment is placed upon the same footing with a judgment rendered in a court of Record, according to the course of the common law. It cannot be collaterally impeached by evidence or by plea, except by a plea denying the existence of the record, and is conclusive until it be set aside by the same court, or reversed upon a writ of error or on an appeal by a superior tribunal. *Ibid.* 138.

4. Where it appears from the record that the property attached is not the property of the debtor, the judgment thereon is absolutely null and void; for an appearance, or a service of process on the person or property of the defendant is essential to the validity of every judgment; but the fact that the property attached was not that of the defendant, cannot be shown by evidence *de hors* the record; and the interlocutory judgment condemning the property attached as the property of the defendant is as much conclusive as any other judgment, until it be set aside or reversed *Ibid.* 138.

5. An irregularity or defect in the affidavit upon which an attachment isssued, if error at all, will not render the judgment void. *Ibid.* 138.

6. A judgment for a larger sum than that sworn to in the affidavit, is erroneous for the excess only. *Ibid,* 138.

7. A plaintiff in attachment who obtains a judgment, sues out execution thereon, and becomes the purchaser at the sheriff's sale, will not be affected by any irregularity in the suing out of the attachment, or any other proceeding prior to the judgment. the judgment is the act of the court, and is a sufficient authority for what is regularly, that is, according to the course of the court, done under it. *Ibid.* 138.

8. There is no law in the statute book which more demands a strict construction, than the attachment law; and very trivial objections to the process, and to the jurisdiction as to the persons, and the like, are to be listened to, if brought forward at the proper time. *Ibid.* 146.

9. If the attachment states that the debtor has absconded from the county in which it issues, *it seems,* that it cannot be contradicted as to that fact by evidence *in pais. Ibid,* 147.

10. Negotiable securities may be attached as "money due to the defendant." *Ibid,* 153.

11. In an original attachment, any defect in the affidavit is waived by an appearance and pleading in chief. *Gormon v. Barringer,* 502. See "Evidence," 28.

AWARD. See "Arbitration and Award."

BAILMENT. See "Possession," 2.

BASTARDY.

1. A defect in the examination of a single woman, as to the putative father of her bastard child, is waived so as to prevent the proceeding from being dismissed, by the person charged appearing and making up an issue whether he be the father or not. *State v. Carson,* 368.

2. Proceedings before justices in bastardy cases, being matters of police only, are more favorably construed than those which are criminal in their nature. *Ibid.* 370.

BEQUEST.

1. A residuary clause in a will, by which all the testator's real and personal estate was directed to be sold by his executors, will not pass slaves which he had given to a child by parol prior to 1806, but which he had subsequently obtained possession of, and held as bailee until his death, nor will it authorize a sale of said slaves by the executors so as to defeat the title of the donee under the act of 1784. (Rev. ch. 225, sec 7). *Bell v. Culpepper,* 18.

2. Where a legacy is given to a described class of individuals, as to the children of A. B., and no period is assigned for the distribution of it, the persons answering this description, at the death of the testator—that is the children of A. B., then in existence or legally considered as then in existence—are alone

entitled to the bequest. But when the enjoyment of the thing given is not to be immediate, but is postponed to a particular period, as at the death of A. B., and there are no special provisions in the will indicating a different intent, then not only those who answer the description at the death of the testator, but those who come into being after his death, and before the time when the enjoyment is to take effect, so as to answer the description at any time before that assigned for the distribution, are all entitled to take; and if any thus entitled to take die before the period of distribution, and there are no words in the will indicating an ulterior disposition of their interests, as to the survivors, they are vested interests, and are transmitted to their representatives. *Knight v. Wall*, 125.

3. A bequest by a testator of a negro girl and her increase to his daughter, for life, and after her death, that "the girl shall go to the children" of his daughter, will carry the increase of the girl, as well as the girl herself, to the children, after their mother's death, although such increase are not mentioned in the bequest over, unless it appears from other parts of the will that the testator intended otherwise. See "Devise"—"Executory Devise"—"Legacy." *Ibid.* 125.

BILLS, BONDS, PROMISSORY NOTES.

1. An acknowledgement of a balance "due at the end of three months" for the delivery of certain specified articles, is not a promissory note, because it contains no express promise to pay, but is a stated account; and a partial failure of the consideration, as a mistake in the quantity of the articles delivered, may be proved in reduction of the amount admitted on its face to be due. *Purtel v. Morehead*, 239.

2. An assignee of a promissory note or of a single bond, who takes it after it is due, is bound by any defence which existed against it and would be available if the action were brought in the name of the assignor; and this rule is not confined to defences affecting the note or bond transaction itself, but extends to a distant and independent set-off. *Haywood v. McNair*, 283.

3. A memorandum reciting the assignment of a promissory note, and engaging to pay, on demand, a stipulated price therefor, is a negotiable security; and proof that the note in consideration of which it was made, was a forgery, cannot be admitted against an assignee for value, who received it before its dishonor. *Elliott v. Smitherman*, 338.

4. An endorsement of a note to a *bona fide* endorsee, made by the payee in a fictitious name, in which it was made to him, is valid, although the name was assumed for a fraudulent purpose. *Ibid.* 338.

5. A bond for the payment of a certain sum in "bank stock, or lawful money of the United States," is not negotiable under the act of 1786, (1 Rev. Stat. c. 13, sec. 3,) so as to enable the assignee to sue in his own name. *Alexander v. Oaks*, 513.

BOND.

1. To an action of debt upon a bond it may be pleaded, that the bond was given upon the consideration of the plaintiff's using

his influence to procure a certain marriage for the defendant; and if the issue upon such plea be found for the defendant, it Will avoid the bond.. *Overman v. Clemmons*, 185.

2. A bond with a condition to be void upon the payment of such damages as might be recovered of the principal obligor, for wrongfully bringing a suit in equity against the obligee, is a guaranty that the principal shall be able to satisfy any judgment obtained against him, in an action on the case, for wrongfully filing the bill; and no action can be brought on Such bond until the obligee has obtained such a judgment, and failed to procure satisfaction. *Davis v. Gully*, 360.

3. An instrument signed and sealed in blank, and handed to an agent verbally authorized to fill up the blank and deliver it, is not the bond of the principal; and after declarations of the principal approving of the delivery by the agent, made in the absence of the instrument, and without any act in relation to it, will not amount to an adoption and ratification of the delivery. *Davenport v. Sleight*, 381. See "Bills, Bonds, and Promissory Notes."

BOOK ACCOUNT.

The term "book account" may comprehend a signed account, as well as an open one; and where the judgment of a single magistrate appeared to have been given on a warrant for more than sixty dollars due by book account, it is to be taken in support of the magistrate's jurisdiction, that the book account was a signed account. *Turner v. Edwards*, 539.

BOUNDARY.

1. Where a grant called for a "beginning at a pine *at the sound side*, and running thence *along the sound and marsh* S. 36 deg. E. 220 poles to the head of a bay which makes out of the sound," it was *held*, that the sound was the boundary; and that such a call could not be departed from to follow mere course and distance, under any circumstances. *Slade v. Neale*, 61.

2. A grant calling for a corner of an adjoining grant, and three of its lines, is in the absence of proof that it was run differently, to be confined to them; and the fact that the grantee after its date, executed a deed for the adjoining tract, which did not refer to either of the grants, and called for the same corner, and one of the three above mentioned lines of his grant, and corresponded nearly with the other two, is not sufficient to control the calls of his grant. *Flannigan v. Lee*, 427.

3. A deed executed by the owner of two adjoining tracts for one of them, but containing no averment as to the boundaries of the other, does not estop him from showing the true boundary of the other tract; and the deed conveying only an estate for the life of the bargainees, he has a right upon the death of one of them to recover an undivided part although he declared for the whole. *Ibid*, 432. See "Evidence," 19, 30.

CANCELLATION. See "Wills," 4, 5.

CAPIAS AD SATISFACIENDUM.

A precept directed to the "sheriff or jailer" of a county, and commanding him to receive the body of the defendant "into the common jail of the county, and him safely keep within the walls of said jail until he shall render" to the plaintiff "the amount of the judgment," &c., is not a *ca. sa* but a *mittimus*, and without a proper *ca. sa.* will not authorize the detention of the defendant, nor make the sheriff liable for his escape. *Walker v. Vick*, 99. See "Sheriff."

CAPITAL CASE. See "Jurors and Jury."

CASE STATED FOR THE SUPREME COURT.

1. It is not competent to reverse a judgment for an abstract proposition delivered by the judge, however erroneous; and unless the evidence be so stated as to raise the question, it is merely abstract. Nor can the Supreme Court go out of one record to another to find the evidence given, or the points made or decided in the former. *State v. Hardin*, 412.
2. An exception, which was intended to bring under review the construction of a deed, cannot be considered where the terms of the deed are not given in the case stated, nor the deed itself certified as a part of it. And the judgment will be affirmed, although it may not be perceived that it was right if it do not appear to be wrong. *Brooks v. Ross*, 484.

CERTIORARI. See "Judgment," 1, 2.

CHALLENGE OF JURORS. See "Jurors and Jury," 3, 4, 5, 6, 7, 8; "New Trial," 1.

CLERK'S BOND. See "Justices"—"Verdict," 3.

CONSIDERATION.

1. A promise made by the vendor of a slave, upon the slave's being discovered to be unsound, either to cure him or to refund the price, there being neither a warranty of soundness nor a fraud in the sale, is void for want of a consideration; because there is no obligation on the vendor to refund the money or to cure the slave; neither does anything of gain to him, or of loss to the vendee, result from the promise. *Hatchell v. Odom*, 302.
2. It is not every moral obligation that is sufficient in law to raise an implied promise, or to support an express one. Such only are available considerations which would originally have been good, but for some rule or policy, as a promise to pay a debt barred by the statute of limitations or the like. *Ibid.* 306.
3. But a moral obligation which never could have been enforced is not a sufficient consideration to support an express promise. *Ibid.* 307.

See "Bills, Bonds, and Promissory Notes," 1, 3.

CONSTABLE'S RECEIPT. See "Guaranty."

CONSTABLE. See "Arrest," 1, 2, 4.

CONSTITUTIONAL. See "Free Negroes," 2.—"Private Property taken for the use of the Public."

CONTRACT. See "Consideration," 1, 2, 3.—"Guaranty," 2.—"Mail Contract."

CORPORATION.

1. Debts due a corporation must be sued for in the corporate name; and cannot be recovered in an action brought in the name of A. B., president, and C. D. and E. F., directors of such company. *Brittain v. Newland*, 363. See "Rail Road Company."

COVENANT.

Where the defendant entered into a penal bond to the plaintiff, with a condition which recited that the plaintiff "had contracted with the defendant to furnish a steam-engine, &c., and to put up a saw-mill frame of the best materials, &c., the said defendant to find everything, erect the furnace and flue, &c., and to have the whole done in a convenient, durable and workmanlike manner, &c., and to have the whole done" by a certain time, it was *Held* that the defendant was to furnish the engine and all the materials, and do all the work, and not the furnace and flue only; and that though there might be some ambiguity in the first part of the condition as to who was to furnish the engine, &c., yet by reading the whole instrument it was clear that the defendant was bound to furnish all the materials and do everything in discharge of his bond. *Gordon v. Rainey*, 487. See "Apprentice," 1, 2, 3.—"Arbitration and Award," 3.—"Evidence," 9, 10.

DAMAGES. See "Mills," 1, 3, 4.—"Private Property taken for the Use of the Public," 1, 2.—"Verdict," 2.

DECLARATIONS. See "Evidence," 2, 5, 8, 19, 22, 26, 28.

DEED.

1. Where an instrument purporting to convey land was signed, sealed and delivered by the grantor to the grantee it is a deed, and not as *escrow;* although the parties afterwards placed it with a third person for safe-keeping until they both should call for it. *Gibson v. Partee*, 530.

2. Fraud *in the execution* of a deed will, at law, avoid it. *Ibid.* 530. See "Bond," 3.—"Infant," 3, 4, 5, 6, 7, 8.—"Probate,"—"Registration," 4.

DEED IN TRUST. See "Registration."

DEMAND. See "Detinue."—"Ejectment," 1.—"Limitations, Statute of," 7, 8.

DEPOSITIONS.

1. The provisions of the act of 1777 (Rev. ch. 115, s. 14), requiring process to be returnable to the term next ensuing its *teste*, does not apply to commissions to take depositions which may be made returnable to any subsequent term. *Duncan v. Hill*, 291.

2. Commissions to take testimony are issued at the instance and for the benefit of one of the parties, and he will usually make them returnable at the earliest day consistent with convenience But if through *laches* or a wish to delay the trial, he should not do so, the non-execution of the commission will be adjudged an insufficient reason for asking a continuance. *Ibid.* 291.

DESCENT.

1. Where land was devised by a grandfather to a grandson who would have succeeded to the grandfather's land in case he had died intestate, it shall, upon the devisee's dying without issue, descend to his first cousin on the part of his grandfather, rather than to a half-brother, who is not of the blood of the devisor. *Felton v. Billups*, 308.

2. Land directed by a testator to be sold, but not devised for that purpose, until a sale, descends to the heir. And if converted out and out the rule at law is the same; the doctrine of conversion being confined to the court of equity. *Ferebee v. Proctor*, 439.

DETINUE.

No demand is necessary to be shown in order to sustain the action of detinue for slaves, where it appears that when the action was brought the defendant held and claimed them as his own property. But if it were necessary, a demand made by one of several plaintiffs would be sufficient, where it was not objected to by the defendant at the time it was made. *Knight v. Wall*, 125.

DEVISE.

1. In a will, the words "my will and desire is that all my property that I have not before given away and lent to be equally divided between," &c., carries to the devisees every reversionary interest of the testator which has not been before specifically devised, whether they were in his contemplation or not, and whether known or unknown by him, unless there is a manifest intention to confine them to other interests; and a subsequent contingent limitation to the children of one of the devisees is not sufficient to raise this intention. *Harrell v. Hoskins*, 479.

2. The words "all my property" include everything, unless the intention to the contrary be plain. *Ibid.* 481. See "Power," 1, 4, 5.

DISCONTINUANCE.

Where an original writ is returned "not found," and a term is permitted to elapse without suing out an *alias*, the suit is discontinued; and if at a subsequent term an *alias* be sued, its date is the commencement of the action, and consequently in an action for slander, if the words were spoken more than six months before its date, the statute of limitation is a bar. *Fulbright v. Tritt*, 491.

DISMISSION OF A CAUSE.

An entry in a cause pending in Virginia, whereby, by the consent of parties, the suit is dismissed, and the defendant adjudged to pay the plaintiff his costs, not being in that State a bar to a subsequent suit for the same cause of action, is not so here; neither is the entry of the payment of the costs, in the absence of all other proof, evidence to support the plea of accord and satisfaction. *Carter v Wilson*, 276.

DISORDERLY HOUSE.

One who entertains strangers only occasionally, although he receives compensation for it, is not an inn-keeper; and if on such occasions gambling, drinking and fighting take place, he is not indictable as the keeper of a disorderly house. *State v. Matthews*, 424.

DIVORCE.

1. A petition praying for a divorce a *vinculo matrimonii* only, will be dismissed, if the petitioner is not entitled to that relief, and upon being refused it, declines asking for any other: for a decree for a divorce *a mensa et thoro*, even in a proper case for it, will never be made by the court, unless at the instance of the party. *Whittington v. Whittington*, 64.

2. Whether adultery committed by either party during an agreed separation would entitle the other to a divorce from bed and board, under the act of 1814 (Rev. ch. 869) *Quere*. But whether it would or not, it is certain that the adultery of the wife after an abandonment of her by her husband, would not entitle *him* to that relief. *Ibid.* 64.

3. An unreasonable delay by one party, after a probable knowledge of the criminal conduct of the other, will, if unaccounted for, preclude such party from obtaining a decree for a separation from bed and board. *Ibid.* 64.

4. Every objection which can be urged against a decree for a separation from bed and board will apply with still stronger force against a decree for a dissolution of the marriage; and though a divorce *mensa et thoro* may be allowed in some instances to a person who is not entirely impeachable, who may not have been exemplary in all the attentions and stipulated offices assumed in contracting the marriage relation, yet the policy of the law, the interest of the offspring, the tranquility and happiness of families in general, forbid the dissolution of marriage at the suit of a person to whom a default in any of the essential duties of married life can be fairly imputed. *Ibid.* 64.

5. A petition for divorce ought, as far as possible, to charge specifically the facts to be given in evidence When open and promiscuous prostitution is the foundation of the libel, it may be sufficient to allege it in more general terms, because the charge is of a nature to admit of very general evidence; but when the petitioner relies on adultery committed with a particular person, or at a particular time, such person, time and place ought to be specially and plainly charged. *Ibid.* 64.

6. The law will not be active to protect a husband from his wife if his acts have been conducive to her turpitude, or if his conduct evince indifference on his part to her profligacy, in its inception or progress. *Ibid.* 72.

7. Where a wife openly prostitutes herself through a period of several years in the neighborhood of her husband, and he makes no inquiry, does not interpose nor even utter a murmur, it implies a license to the wife, so far as his rights and honor are involved, to act as she pleases, and amounts by fair intendment and constructively to condonation. *Ibid.* 72.

8. Suit for a divorce ought to be brought within so short a time as reasonably to show that the party is smarting under and acting on a proper sense of the wrong itself; and that he has not acquiesced until he finds it necessary to justify himself to others, or becomes desirous of a divorce for some other ulterior purpose. *Ibid.* 73.

9. The discretionary authority given by the act of 1814 (Rev. ch. 809), to the court to decree a dissolution of the marriage, or a separation of the parties, where one of them leaves the other and is living in adultery, is not an arbitrary discretion, but a sound and judicial one, founded on reasonable and fixed principles. *Ibid.* 74.

10. The courts of this State have not power, in petitions for divorce and alimony under our law, to allow alimony *pendente lite*. *Wilson v. Wilson*, 377.

11. A petition which states that the husband has treated the wife with cruelty, and offered indignities to her person, but which specifies no particulars of either, is not sufficient to authorize a decree for a divorce. *Ibid.* 381.

DUE BILLS.

1. The act of 1816 (Rev. c. 900), relates to the former one of 1809, (Rev. c. 770), and the scope of both acts, or of the act of 1816, construed in reference to that of 1809, is to make it an indictable offence to issue, pass or receive small notes, checks or due bills as a substitute

for money Hence the *intent* that a note issued should pass current as a substitute for money, or that in fact it was so issued and passed, is an essential ingredient of the offence, and must be averred in the indictment, and proved on the trial. *State v. Humphreys*, 555.

2. The acts of 1809 and 1816, prohibiting the issuing and circulation of small promissory notes or due bills as money, are not unconstitutional. *Ibid.* 555.

EJECTMENT.

1. In an action of ejectment by one tenant in common against another, proof of a demand to be let into possession by the lessor of the plaintiff subsequent to the demise laid in his declaration, and a refusal by the defendant denying the plaintiff's right, is evidence from which the jury may infer a previous ouster, or adverse possession, at the time of the demise laid in the declaration. *Hargrove v. Powell*, 97.

2. By entering into the general consent rule, a tenant in common admits the ouster of his companion. To avoid such admission when there has been no actual ouster, he must apply to the court for leave to enter into a *special rule*, requiring him to confess lease and entry at the trial, but not ouster also; and this special rule will always be granted when the tenant does not dispute his co-tenant's title; but where he does dispute his companion's title he shall be compelled to confess lease, entry and ouster before he pleads. *Ibid.* 97. See "Boundary," 3.—"Evidence," 9, 10.—"Infant," 8.—"Mesne Profits."

ELECTION.

1. The doctrine of election, by which a person is prohibited from taking a benefit under a will, and at the same time disappointing the plain provisions of that will in favor of third persons, is confined to courts of equity and does not affect titles at law. *Bell v. Culpepper*, 18.

2. The acceptance of a legacy under a will will not at law prevent the legatee from setting up any claim which he may have to property bequeathed to another person in the same will. *Alston v. Hamlin*, 115.

ENTRY AND GRANT.

1. A grantee cannot, under the act of 1798 (Taylor's Rev. App. 193), maintain a *scire facias* to repeal a prior grant of the same land; neither will the fact of his entry being the first entitle him to that remedy. *O'Kelly v Clayton*, 246.

2. An elder entry converts a patentee of the same land with notice into a trustee, and the appropriate remedy is in equity. *Ibid.* 249.

EQUITY.

A court of law can determine whether a suit in equity was wrongfully brought or not. *Davis v. Gully*, 363.

ESCAPE. See 'Capias ad Satisfaciendum."

ESCROW. See "Deed."

ESTOPPEL.

1. The act of 1806 (Rev. ch. 701), having been enacted on purpose to exclude all parol evidence of a gift of slaves, necessarily avoids every parol estoppel that might be set up to defeat its operation. *Alston v. Hamlin*, 115.

2. A title to slaves cannot be acquired by a parol estoppel. *Knight v. Wall*, 125.

3. A person claiming title under one who is estopped will also be bound by the estoppel. *Sikes v. Basnight*, 157.

4. He who claims title to land by estoppel is as to those estopped in the constructive possession of the land; and in an action of trespass no one who is bound by the estoppel can prove a superior title in a stranger, unless the court be satisfied that such trespasser at the time he entered did not claim title under the deed by which he is estopped; in which case the evidence would be admissible to show that he was accountable in damages to the stranger who had the better title; and not to the plaintiff. *Ibid* 157.

5. A final judgment in a petition for partition of real estate under the act of 1789 (Rev. ch. 309), is conclusive upon all the parties to it; and each party is estopped to dispute the title of any other to the lot assigned to that other in severalty. *Mills v. Witherington*, 433. See "Boundary," 3.—"Possession," 1.

EVIDENCE.

1. Where the propriety of admitting testimony to the court below depends upon an inference of fact, such inference must be drawn by that court; and the admission of testimony founded upon such inference cannot be assigned as error in the Supreme Court. *State v. Swink*, 9.

2. Where it appeared upon a trial for murder that the deceased came to her death in part from strangulation with a rope, and the prisoner while before the examining magistrate, but before the examination had begun, said—in reply to a bystander who had a rope in his hand—"that is not the rope;" upon which the magistrate observed to the prisoner, "keep that to yourself;" it was *Held*, that the prisoner's declaration was admissible in evidence against him whether he desisted from speaking further of his own accord or at the suggestion of the magistrate. *Ibid.* 9.

3. Where a man who is at full liberty to speak, and not in the course of a judicial enquiry, is charged with a crime and remains silent, that is makes no denial of the accusation either by word or gesture, his silence is a circumstance which may be left to the jury, to be considered together with other circumstances in deciding upon his guilt. *Ibid.* 9.

4. Where the judge, in charging the jury upon the subject of presumptive evidence in a capital case, stated that there were three grades, to-wit: slight, probable and violent; that the jury was not to consider the first all, but that they might act upon the two others, though the testimony must be such as to satisfy them beyond a reasonable doubt of the guilt of the prisoner, and further that the circumstances must be as clear and as strong as the testimony of one credible and respectable witness; it was *Held*, that taking the whole charge together, there was nothing in it of which the prisoner had a right to complain. *Ibid.* 9.

5. In criminal as well as in civil cases the whole of an admission or declaration made by a party is to be taken together. But the acts or declarations of a party are not to be excluded because not as complete as he intended they should be. *Ibid.*, 13, 14.

6. To repel the allegation of an *alibi*, it is relevant to prove that on the morning after the offense was committed, a servant of

the defendant went to a neighbor's house to borrow a pair of saddle-bags, and returned with them towards home, if it be further proved, that the defendant was seen soon afterwards, with a pair of saddle-bags, going in a direction from home. *State v. Scott*, 35.

7. It is not allowable to counsel, on a cross-examination, to put a question to a witness concerning any collateral fact *not relevant to the issue*, for the purpose of disproving the truth of the expected answer by other witnesses. His answer to such a question must be taken as conclusive; and no evidence can be afterwards admitted to contradict it. But this rule does not apply to any inquiry respecting the fact in issue, or its attendant circumstances, or any facts immediately connected with the subject of inquiry. *Radford v. Rice*, 39.

8. A declartion made in the presence and hearing of a witness and not contradicted by him, is proper to be submitted to the jury as evidence that he acquiesced in and admitted the truth of such declaration; and if at variance with his testimony on the trial, may be used to impeach his credibility. *Ibid.* 39.

9. In an action for the breach of a covenant for a quiet enjoyment, the record of a recovery in ejectment by a third person against the vendee, effected after notice to the vendor of the pendency of the ejectment, is not conclusive evidence against the vendor, of the superior title of such third person. *Martin v. Cowles*, 101.

10. *It seems* that such a record is not any evidence of title against the vendor. *Ibid*, 101.

11. A copy of a will made in another State, with its probate certified by the Judge of the Court in which it was proved, and accompanied by the testimonial of the Governor of that State, that the person who gave that certificate was the proper officer to take such probate, and to certify the same, is a sufficient authentication of the will, under our act of 1802 (Rev., ch. 623) to authorize its reception as evidence in our courts. *Knight v. Wall*, 125.

12. The marriage of slaves in this State, consisting of cohabitation merely, by the permission of their owners, does not constitute the relation of husband and wife, so as to attach to them the privileges and disabilities, incident to that relation by the common law. Hence *it was held*, that a slave who was the wife of another slave might give evidence against him even in a capital case. *State v. Samuel*, 177.

13. But if the wife of a slave were incompetent to give evidence against him during their cohabitation as man and wife, yet she would undoubtedly be admissible after they had separated, and she had become the wife of another slave. *Ibid*, 177.

14. In every case arising upon the question of the admissibility of husband and wife as witnesses for or gainst each other, whether the witness be called by the one side or the other, the test and the only test of competency is this: are they in fact and in law husband and wife? *Ibid*, 179.

15. The incidental notice taken of the marriage of slaves to be found in some of our statutes for instance in the act of 1729 (Rev., c. 19) does not legalize their marriage, so far as to affect

the question of their admissibility as witnesses for or against each other. *Ibid*, 183.

16. To authorize the admission in evidence of a paper purporting to contain the substance of a letter sent to the plaintiff, to which he had returned an answer, *it was held* to be sufficient, after a notice to produce the original, to prove that at a particular time, a letter written to be sent to the plaintiff, and the same in substance with the paper then offered, was seen and read by one witness, though he did not see it sealed and delivered to the messenger; and that another witness about the same time carried a letter to the plaintiff, from whom he received another letter, which the plaintiff told him was in answer to the one he had brought. *Overman v. Clemmons*, 185.

17. A letter sent to one of the parties cannot be given in evidence to prove the facts stated in it; but if the party to whom it is addressed write an answer thereto, such answer can be read against him, and the letter must also be admissible to explain the answer. The letter and the answer form together a written conversation. *Ibid.* 185.

18. A marriage settlement in which the plaintiff was a trustee for the intended wife, may be given in evidence to show the plaintiff's influence with her, where evidence of such influence is admissible; but it is very slight evidence and can be used for that purpose only. *Ibid.* 185.

19. In questions of boundary, the declarations of a deceased person are admissible in evidence; but not those of a person who has removed from the state. *Hartzog v. Hubbard*, 241.

20. A sworn copy of a letter cannot be received without accounting for the original. *Murphy v. McNiel*, 244.

21. One party cannot give in evidence a conversation between himself and a third person in the absence of the other party; for as to what the party himself said, it was only his own declaration, and as to what the third person said, it was not an oath, and the opposite party had no opportunity to cross-examine him. *Ibid.* 244.

22. Declarations of a witness inconsistent with his testimony on trial may be given as evidence to discredit him. *Ibid.* 244.

23. In an action of slander, transactions between the defendant and others to which the plaintiff was in no way privy, are not admissible in evidence against the plaintiff. *Hamilton v. Smith*, 274.

24. A defendant in attempting to prove an *alibi*, cannot give in evidence what he stated to a witness who saw him at a distant place at a particular time. *State v. Morgan*, 348.

25. The unsupported testimony of an accomplice, if it produces entire belief of the prisoner's guilt, is sufficient to warrant a conviction. And the usual direction to the jury not to convict upon it, unless supported by other testimony, is only a precautionary measure to prevent improper confidence, being reposed in it; and the propriety of giving this caution, must be left to the discretion of the judge who tries the cause. *State v. Haney*, 390.

26. Where an association for a criminal purpose is proved to exist, the acts of one of the associates in furtherance of that purpose, as well as his declarations in respect of it, are admissible against the others; and this where the act or declaration is subsequent to the actual perpetration of the crime. *Ibid.* 390.

27. The evidence of an accomplice is undoubtedly competent, and may be acted on by the jury, as a warrant to convict, although entirely unsupported. It is however dangerous to act exclusively on such evidence; and therefore the court may properly caution the jury, and point out the grounds for requiring evidence confirmatory of some substantial parts of it. But the court can do nothing more; and if the jury really yield faith to it, it is not only legal, but obligatory on the consciences to found their verdict upon it. *State v. Hardin,* 407.

28. Upon the trial of an action commenced by original attachment, the court may permit the bond executed upon suing out the process to be cancelled, and another given in order to enable the plaintiff to examine a surety to it. *Garman v. Barringer,* 503.

29. A claim to land without possession, does not raise the presumption of a grant. It is also incompetent to show a mistake in the description of a deed. In both cases it is nothing more than the party's own declaration, which, unsustained by accompanying acts, is not evidence for him, nor for any person setting up a derivative title under him. *Dancy v. Sugg,* 515.

30. Hearsay evidence as to boundary *post litem mortem* is inadmissible. *Ibid.* 515. See "Judgment," 6—"Justice's Judgment," 2—"Laws of Another State"—"Mesne Profits"—"Murder," 1—"Usury."

EXECUTION.

1. A writ of *venditioni exponas* directed "to the sheriff" for the sale of land levied upon by a sheriff who has gone out of office, will not authorize a sale of land by such late sheriff; for whatever power is granted by the writ, is given to him to whom it is directed. *Tarkington v. Alexander,* 87.

2. An ex-sheriff cannot sell lands levied upon by him under a *fi. fa.* while he was in office, without a *venditioni exponas* directed to him; and it *seems* that when a sheriff has levied upon lands which remain unsold until after he goes out of office, the *vendltioni* should issue to his successor, and not to him. *Ibid.* 87.

3. Where a sheriff has levied upon both lands and goods and gone out of office, a general *venditioni* may issue to the new sheriff, where the goods have been delivered over to him; but if he cannot get the goods from the old sheriff, a *distringas* should issue to him to compel the old sheriff to sell the goods; to which may be added a special *venditioni* in case the moneys thereby raised be not sufficient to satisfy the judgment, authorizing the new sheriff to sell the land—or if the plaintiff chooses to *waive the levy,* a special *fi. fa.* to the new sheriff for the residue. *Ibid.* 87.

4. A vested remainder in slaves may be sold during the life of the tenant for life, under a *fi. fa.* against the person entitled to each remainder. *Knight v. Leak,* 133.

5. All vested legal interests of a debtor which he himself can legally sell, in things which are themselves liable to be sold under a *fi. fa.* may also be sold. *Ibid.* 135. See "Fraud," 1, 2—"Sheriff's Sale."

EXECUTOR DE SON TORT.

1. A resident of this state, at whose house a citizen of Georgia died while on a visit, cannot, in a suit by a creditor of the deceased living in Georgia, be rendered responsible as an executor *de son tort* for taking possession of a sum of money which the deceased had with him at the time of his death, and paying it over without notice of the creditor's claim, to a person who had administered upon the effects of the deceased in Georgia. *Nisbet v. Stewart,* 24.

2. Whether in such a case he would be responsible to a creditor in this state, Qu? *Ibid.* 24.

EXECUTORS AND ADMINISTRATORS.

1. An administrator who is a surety to a debt of his intestate, by giving his own bond in lieu of that of his intestate, and taking up the latter, intends *prima facie* a payment of the debt and not a continuance of it. *Vanhook v. Williams,* 260.

2. A power to sell land conferred upon several executors, must be executed by all who proved the will. *Wasson v. King,* 262.

3. Whether an executor, after joining in a sale, have a right to refuse to execute a deed: if not, whether he shall be compelled to join, are questions which belong exclusively to a court of equity. *Ibid.* 263. See "Executor de son Tort."—"Power."

EXECUTORY DEVISE.

In a bequest of personal property to B. R., and if he "dies leaving no heir lawfully begotten of his body" thereover, the limitation is not too remote, but is good as an executory devise. *Miller v. Williams,* 500.

FALSE IMPRISONMENT. See "Arrest," 1, 2, 3, 4.—"Sheriff."

FELONY.

1. All crimes which are capital are felonies, although that term may not be used in the statutes creating them. *State v. Jesse,* 299.

2. The office of the term *felonice,* is to describe the intent at the instant of doing a criminal act—to apprise the court of the measure of punishment—and to regulate the form of trial. It has no synonyme. *Ibid.* 300.

3. And it is not dispensed with by the act of 1811, (Rev. c. 809) regulating proceedings on indictments; for it is matter of substance and cannot be dispensed with. *Ibid.* 301.

FORCIBLE TRESPASS. See "Indictment," 9, 10.

FORGERY.

1. In a prosecution for forgery, the forged note being seen in the hands of the defendant, in the county in which the forgery

is charged to have been committed, is, in the absence of all proof of the place where, and the person by whom the note was actually forged, sufficient evidence to justify a conviction. *State v. Morgan*, 348.

2. Forgery being a misdemeanor only, the defendant is not entitled to thirty-five peremptory challenges under the act of 1777, (Rev. ch. 115, sec. 85) unless the offence is charged to be a second one. *Ibid.* 348. See "Indictment," 12, 17.

FORMER JUDGMENT. See "Dismission of a Cause."—"Indictment," 5.

FRAUD.

1. *It seems* that a purchaser under execution, who advances in part his own money, and in part that of the defendant in the execution, may acquire a sufficient title to stand as a security for his own money advanced, unless he intended to deceive his creditors, by claiming the purchase as an absolute one. *Testerman v. Poe*, 163.

2. A *bona fide* purchaser of land at a sheriff's sale, does not extinguish his title at law, by consenting that the same land may be levied upon and sold under another execution; although it might be a fraud upon the person in whose favour he gave such consent, which would sustain a personal action at law, or be the ground of relief in equity. *Ibid.* 103.

3. The statute of frauds of Virginia, making a possession of slaves for five years under a bailment, fraudulent as to the creditors of the bailee, has no effect unless the full term of the possession takes place in that state; and where it commenced there, but was completed in this state, *it was held*, that a purchaser under an execution issuing here against the bailee, acquired no title. *Baird v. Brady*, 341. See "Deed," 2—"Guaranty," 3—"Indictment," 8.

FREE NEGROES.

1. The act of 1831, c. 13, authorizing the hiring out of a free negro or free person of color, convicted of an offence against the criminal laws of the state, for the payment of the fine imposed, where he is unable to pay the same, does not extend to one who submits to the court. *State v. Oxendine*, 435.

2. Whether the act of 1831, ch. 13, is repugnant to any of the provisions of the constitution and therefore void, Qu? *Ibid.* 435.

GAMING WITH SLAVES—See "Indictment," 1.

GUARANTY.

1. An assignment for value by endorsement of a constable's receipt amounts to but a *guaranty*, and the guarantee cannot recover of his guarantor, without showing that he has used proper diligence in endeavouring to collect the claim mentioned in the receipt, either of the person from whom it is owing, or from the constable who received it for collection. *Eason v. Dixon*, 78.

2. Where a contract binds one collaterally, and depends upon the default of another, notice of that default ought to be given,

in order to charge the person secondarily liable, as in cases of guaranties and the like. *Adcock v. Fleming*, 225.

3. A guaranty of a note upon an assignment of it, is not an engagement to pay the debt of another, within the statute of frauds. *Ibid.* 225. See "Bond," 2—"Justices' Jurisdiction," 2.

HARBORING.

The harboring and maintaining a runaway slave, to be within the act of 1791, (Rev. c. 335, s. 4) must be secret. *Thomas v. Alexander*, 385.

HUSBAND AND WIFE.

1. A husband *jure maritl* has such a dominion over the vested legal interest of his wife in a chattel, real or personal, of which a particular estate is outstanding, that he can sell such interest so as to transfer it completely to the purchaser; or the law can transfer it for his debts. But the law is different as to the assignment by a husband of his wife's equitable interest in a chattel, in which she has not the right of immediate enjoyment; for such assignment will not prejudice her right, should he die before her, and before the period allotted for such enjoyment to take effect. *Knight v. Leak*, 135.

2. A legacy given to a wife during her coverture but not paid to the husband during his lifetime, survives to her; especially where he joined her in a suit to recover it, and died before final judgment. *Revel v. Revel*, 272.

3. In lands conveyed to husband and wife, they have not a joint estate, but hold by entireties; and upon the death of either of them, the whole estate continues in the survivor, notwithstanding the act of 1784 (1 Rev. Stat. c. 43, sec. 2) for abolishing the right of survivorship. *Motley v. Whitemore*, 537. See "Evidence," 12, 13, 14—"Practice," 3.

INDICTMENT, No. 1.

1. In an indictment under the act of 1830, ch. 10, against a white man, for playing cards with slaves, it is sufficient to charge that the defendant "unlawfully did play at a game of cards," without specifying the particular game played at with the cards. *State v. Ritchie*, 29.

2. Where a statute creates an offence, and not only declares the specific penalty, but also the mode in which it shall be recovered, that particular method, and no other, must be pursued. Hence it is not indictable, for a justice of the peace to celebrate the rights of matrimony, without a license from the clerk of the county court, under the act of 1778, (Rev. ch. 134) as that act not only makes that an offence which was not so at common law, but also annexes the penalty, to wit, fifty pounds; and the mode of recovery, to wit, by action of debt. *State v. Loftin*, 31.

3. In an indictment on a statute, no allegation of unlawfulness, nor of being against the statute, nor any conclusion will make good the indictment, if it does not bring the fact prohibited or commanded, in the doing or not doing whereof the offence consists, within the material words of the statute. Hence, if the statute forbids the doing of a particular act, without the

authority of either one of two things, the indictment must negative the existence of both those things, before it can be supported. *Ibid.* 31.

4. An indictment for malicious mischief may conclude at common law; and in such indictment, it is not necessary to charge malice against the owner of the property injured. *State v. Scott,* 35.

5. Where a bill of indictment for an assault and battery was found in the Superior Court against a person who was subsequently, but before being taken to answer the charge in the Superior Court, indicted and convicted in the County Court for the same offence, *it was held,* that the County Court had jurisdiction of the case, notwithstanding the bill found in the Superior Court; and that to that bill he might plead his former conviction in the County Court. *State v. Tisdale,* 159.

6. The finding of a bill does not confine the state to that single bill; another may be preferred and the party put to trial on it, although the first remains undetermined. *Ibid.* 160.

7. If two indictments for the same offence be found in the same court, the course is to quash one before the party is put to plead on the other. If in different courts, the defendant may *abate* the latter by plea, that another court has cognizance *of the case,* by a prior bill. Should a plea in abatement not be made to the second bill, and a conviction be had upon it, such conviction may be plead, *puis darrein continuance,* in bar of the first bill. *Ibid.* 160.

8. Whether fraud in procuring a prosecution and conviction in a court having jurisdiction of the offence can, in another court of concurrent jurisdiction, where a prior bill has been found, be replied to a plea of such conviction, Qu? But if it can, it must be averred on the record, and is not to be presumed from the mere fact of the former bill's having been found. *Ibid.* 161.

9. An indictment for a forcible trespass to chattels must charge the trespass to have been committed in the presence of the owner, and the taking to have been from his actual possession. *State v. Love,* 267.

10. A trespass to be indictable must involve a breach of the peace, or manifestly tend to it; and must therefore be in the presence of the owner, to his terror or against his will. *Ibid.* 268.

11. An indictment upon the act of 1823 (Taylor's Rev. ch. 1229) making an assault by a person of color upon a white female, within intent to commit a rape, capital, must charge the *assault* to have been felonious. Charging an assault, with intent *"feloniously to ravish"* is not sufficient. *State v. Jesse,* 297.

12. An indictment charging that the defendant did "falsely forge and wittingly assent to the falsely making, &c.," following the words of the statute, is according to the precedents, and sufficient. *State v. Morgan,* 348.

13. An indictment under the act of 1779 (Rev. c. 142) which charges the seduction of a slave to be with an intent "to sell, dispose of and convert to his own use," is sufficient. For the

felony created by the act is sufficiently described by charging the seduction to be with an intent "to sell," and the words "dispose of and convert to his own use," do not extend the intention imputed, beyond that of an intention to sell, and at worst are only redundant. *State v. Haney*, 390.

14. And charging the taking to be "by violence, seduction and other means" is not repugnant, as both violence and seduction may have been used, but if it were double, it is aided by a verdict finding the taking to be by seduction only. *Ibid.* 390.

15. The words "other means" if used alone would be too indefinite; but taken in connection with the words "by violence and seduction," they are merely superfluous. *Ibid.* 390.

16. A count on the act of 1779 for the seduction of a slave need not charge him to be of any value. *Ibid.* 390.

17. A crime which may be committed by the agency of several means, is well described if charged to be by the agency of all, as a forgery may be charged to have been by false making, and by procuring to be falsely made. *Ibid.* 403.

18. An unnecessary averment which renders an indictment ungrammatical, does not vitiate it, although it should be carefully avoided. *Ibid.* 406.

19. If an indictment be found without evidence, or upon illegal evidence, as upon the testimony of witnesses not sworn, upon proof of the fact the bill may be quashed, or the matter may be pleaded in abatement. *State v. Roberts*, 542. See "Arrest of Judgment"—"Disorderly House"—"Due Bills," 1—"Felony"—"Road," 1—"Schoolmaster."

INFANTS.

1. If an infant live with his parent, who provides for his child every thing which in his judgment appears to be proper, the infant cannot bind himself to a stranger, even for such articles as might under other circumstances be deemed necessaries. But if the infant live apart from his father, laboring, and receiving the profits of his labor to his own use, he is *pro tempore* acting as his own man, by an assent of his father, and will be liable for necessaries suitable to his condition. *Smith v. Young*, 26.

2. The question whether necessaries or not is a mixed question of law and fact. Whether the articles furnished to an infant are of the classes for which he is liable, is a matter of law; whether they were actually necessary and of a reasonable price, is matter of fact. *Ibid.* 26.

3. A deed of bargain and sale made by an infant, is avoided by his executing, upon his arrival at full age, another deed of the same kind, and for the same land to a different person. *Hoyle v. Stowe*, 320.

4. It seems that to ratify a bargain and sale made by an infant, some act done after full age, proceeding upon the notion that the estate created by the deed subsists, is necessary, as the receipt of the purchase money or the like. But if declarations be sufficient for that purpose, they must be clear and unquivocal, and made with a view to its ratifications. *Ibid.* 320.

5. The disability of infancy can be insisted on only by the infant, or his privies in blood: privies in estate cannot take advantage of it. But after the infant has avoided his deed, it may be disaffirmed by any person. *Ibid.* 323.

6. Whether the deed of an infant is void, or only voidable. Qu.? *Ibid.* 323.

7. Is not a deed of bargain and sale by an infant inefficacious until confirmed; and must the proof of confirmation come from him claiming under it. Qu? *Ibid.* 323.

8. A feofment by an infant must be avoided by an entry before another person can maintain ejectment, because it passes the land itself, and creates a defeasible estate. But a deed operating under the statute of uses, does not transfer the land, and only such uses are executed as are enforced in chancery; and no use is there raised by the contract of an infant to sell his land. *It seems* therefore, that it may be disaffirmed without an entry, and by plea of not guilty or *liberum tenementum.* And also that ejectment cannot be maintained on it without showing a confirmation after full age. *Ibid.* 324.

INN KEEPER. See "Disorderly House."

INSOLVENT DEBTOR.

1. A person who is surrendered in discharge of his bail, is entitled to the benefit of the act of 1822, (Taylor's Rev., c. 1131,) for the relief of insolvent debtors. *Smallwood v. Wood,* 356.

2. The act of 1822 (1 Rev. Stat., c. 58, sec. 7,) for the relief of insolvent debtors, extends only to debts arising *ex contractu,* and not to those incurred for a penalty, or *ex delicto. Wooland v. Dean,* 490.

JOINT TENANTS. See "Husband and Wife," 3—"Tenant in Common."

JUDGE'S CHARGE.

1. It is not error for a judge to omit remarking upon a part of the testimony, if no particular charge in relation to it be prayed. *State v. Scott,* 35.

2. A judge in his charge to the jury should not instruct them upon a statement purely hypothetical. *State v. Benton,* 223.

3. A judge is not bound to recapitulate all the evidence to the jury; it is sufficient for him to direct their attention to the principal questions which they have to investigate and to explain the law applicable to the case, and this particularly when he is not called upon by the counsel to give a more full charge. *State v. Haney,* 390. See "Verdict," 4.

JUDGMENT.

1. After a trial and conviction have been had in a county to which the cause has been removed, upon a motion in arrest of judgment, for a defect in the transcript of the record, the Judge may suspend the judgment and order a *certiorari* for a more perfect transcript; and if, upon the return of the *certiorari* to the next term, it appears, that the first transcript contained

a full and complete record of the proceedings, although it was written upon two separate and detached sheets of paper, the first containing the indictment, plea and order of removal, and the second, the other entries with the certificate of the clerk; the Court may then proceed to pronounce judgment; for it then appears, that it had jurisdiction of the cause, at the term when the trial took place. *State v. Scott*, 35.

2. The principle that the judgment of a court of record is conclusive until set aside or reversed, applies to all courts to which a writ of error runs from a higher court, or from which an appeal lies to a higher court, which proceeds according to the course of the common law, because these are adequate remedies for any error. As to inferior tribunals, or those having a special and peculiar jurisdiction, it is otherwise. Their improper acts may in some instances be restrained in their progress, by prohibitory writs from the court of general superintending powers; nor in others may be corrected by having their proceedings brought up by *certiorari* and quashed; and in yet others may be questioned by plea, *Skinner v. Moore*, 144.

3. An irregular judgment does not justify the plaintiff in any of the acts done under it provided it be set aside, although it does the officer, and a stranger gets a good title, even if it be set aside. It is the same as to the party when set aside, as if it had never been. *Ibid.* 155.

4. A judgment is not irregular because it is erroneous. Error does not constitute irregularity, nor does it necessarily enter into it. An *irregular judgment* is one entered contrary to the course, the practice of the court, as out of term time, &c. If it appear upon the record entirely free from error, yet the court by which it purports to have been pronounced, may set it aside for the *irregularity*; but no other court can, unless in an appellate capacity. *Ibid.* 156.

5. The return of satisfaction to a *fi. fa.* issuing on a judgment, is conclusive upon a *scire facias* to revive such judgment; and the only way in which such return can be got rid of, is by application to the court to amend it. *Snead v. Rhodes*, 386.

6. The only *legal* proof of a judgment, is by the production of the formal entry of it; but minutes made during the progress of a cause, if received without objection to their form, are sufficient proof of the judgment, if from them a formal entry can be made up. *Gibson v. Partee*, 530.

7. In an action against two, there cannot be a judgment against both for part of the demand, and against one of them for the residue; and an amendment in the appellate court, will be allowed only on the payment of all costs. *Weed v. Richardson*, 535. See "Arrest of Judgment"—"Attachment," 1, 2, 3, 4, 5, 6, 7—"Case Stated for the Supreme Court," 1, 2—"Justice's Judgment"—"Laws of Another State"—"Pleas and Pleading," 5—"Road," 1—"Scire Facias," 2—"Superior Court."

JURISDICTION. See "Attachment," 2, 8—"Pleas and Pleading," 1.

JURORS AND JURY, No. 1.

1. A jury charged in a case of capital felony, cannot be discharged before rendering a verdict, at the discretion of the court, with-

out the prisoner's consent: nor can they in such case be discharged, but for evident, urgent, overruling necessity, arising from some matter occurring during the trial, which was beyond human foresight and control; and generally such necessity must be set forth in the record. *State v. Ephraim*, 162.

2. On the trial of a capital case, the names of the jurors of the original panel should be first put into the box and drawn, before those of the tales jurors are put in and drawn; and the jurors summoned under a special *venire facias*, as provided by the act of 1830, ch. 27, are in this respect to be regarded as talesmen. *State v. Benton*, 196.

3. The officer prosecuting for the state, may on a capital trial direct a juror to stand aside until the panel be gone through with, which is a challenge for cause to be shown at the end of the panel; and if a cause be then shown and disallowed, the prosecuting officer may still challenge the juror or not, at his discretion. But this practice of permitting the prosecuting officer to defer showing his cause of challenge until the panel be gone through, must be exercised under the supervision of the court, who will restrain it if applied to an unreasonable number. *Ibid.* 196.

4. A juror may be examined as to opinions honestly formed, and honestly expressed, manifesting a bias of judgment, not referable to personal partiality or malevolence; but if the opinion have been made up and expressed under circumstances which involve dishonor and guilt, and where such expression may be visited with punishment, he ought not to be required to testify so as to criminate himself. *Ibid.* 196.

5. An opinion fully made up and expressed against either of the parties on the subject matter of the issue to be tried, is good cause of principal challenge; but an opinion imperfectly formed, or one merely hypothetical, that is founded on the supposition that facts are as they have been represented or assumed to be, does not constitute a cause of principal challenge, but may be urged by way of challenge to the favor, which is to be allowed or disallowed as the triers may find the fact of favor, or indifferency. *Ibid.* 196.

6. A challenge of a juror because of his having formed and expressed an opinion upon the question to be tried, can be made only by that party against whom it was so formed and expressed. *Ibid.* 196.

7. The forbearing of the court to discharge a juror to whom no exception has been taken, though there be ascertained cause of challenge against him, cannot be assigned for error, because the right of challenge in the parties remains, and neither of them can be injured by such forbearance to act on the part of the court. *Ibid.* 196.

8. The nature and legal consequences of the practice of putting what is called the preliminary question to jurors upon capital trials, explained, and such practice, except under particular circumstances, disapproved of; and the legal and regular mode of trying exceptions to jurors, and forming juries on trials for capital offences, pointed out and recommended. *Ibid.* 196. See "Forgery."

JUSTICES.

1. It is a gross negligence in the Justices of the County Court to take from their clerk, as a bond, an instrument having no sum of money inserted in the body of it; and they will be liable therefor, as if they had taken no bond. *Bank v. Davenport*, 45.
2. The Justices of the County Court may be proceeded against in a summary manner under the act of 1819, (Rev., ch. 102,) as the sureties of their clerk, for permitting him to officiate as clerk, without giving bond, as prescribed in the acts of 1790, (Rev., c. 327) and 1809, (Rev., ch. 777). *Ibid.* 45.

JUSTICE'S JUDGMENT.

1. In ejectment for land purchased at a sheriff's sale, under an order of sale made by the County Court upon the return of a constable that he had levied on the lands of the defendant, the purchaser must show the Justice's judgment returned to court according to the directions of the act of 1794 (Rev., ch. 414, s. 19;) and an entry on the trial docket of the Court at the foot of the case, of an "order of sale" is not such a judgment as the law requires to be shown. *Ingram v. Kirby*, 21.
2. Where a justice's execution has been levied upon lands and returned to the County Court, the production of the trial docket of the court containing a mere note or memorandum of the case, with an "order of sale," entered at the foot of it, together with the testimony of the clerk that after a diligent search he had been unable to find the original papers in the suit, is not sufficient evidence of the loss of the justice's judgment, if evidence of such loss be admissible. *Ibid.* 21.

JUSTICE'S JURISDICTION.

1. A single justice has jurisdiction upon a valid engagement "to pay the sum of one hundred bushels of corn" and the warrant is sufficient, if it be "to answer, &c., of a plea of debt, the sum of," &c., as in the contract. *Hamilton v. Jervis*, 227.
2. Where the plaintiff received notes in discharge of one which he held against the defendant, and the latter refused to endorse them, but promised to pay them, if the plaintiff should fail to collect them, *it was held*, that the promise was a guaranty of the notes; and that an action upon the promise was not within the jurisdiction of a single magistrate. *Adcock v. Fleming*, 470.
3. A plaintiff may warrant upon any demand of which in terms jurisdiction has been given to a magistrate, although the investigation of the demand may lead to inquiries into subjects of which direct jurisdiction has not been given. *Ibid.* 473. See "Book Account."

LANDLORD AND TENANT. See "Possession."

LARCENY.

1. In an indictment for larceny, one cannot be convicted as a principal, unless he were actually or constructively present at the taking and carrying away of the goods. His previous assent to, or procurement of the caption and asportation, will not make him a principal, nor will his subsequent reception of the thing stolen, or his aiding in concealing or disposing of it, have that effect. *State v. Hardin*, 407.

2. Where one got staves upon the land of another upon a contract to have half for getting them *it was held*, that while they remained on the land undivided, the manufacturer was neither a tenant in common with the owner of the land, nor a bailee of them; and that therefore he, or any other person with his connivance, might be guilty of larceny in taking them. *State v. Jones*, 544.

LAWS OF ANOTHER STATE.

The courts of this State do not know the law of other States, and a controversy respecting that law is ordinarily one of fact, which must be decided on evidence by the jury under the instruction of the court. The only exception to this rule is when *nul tiel record* is pleaded to the judgment of a court of record in another State, in which case the court here must pass not only upon the existence of the supposed record, but upon its legal effect. *Knight v. Wall*, 129.

LEGACY.

1. If a testator by his will forgive a debt, the assent of the executor is necessary before the debt is extinguished. *Cheshire v. Cheshire*, 254.

2. An assent to a legacy by the executor may be presumed from his acts or declarations, as well as expressly proved; and where upon a bequest of a pocketbook and its contents, the executor estimated the amount, and stated that that was all the legatee took under the will; *it was held* to be not in law an assent, but only a fact from which it might be assumed. *Ibid.* 254. See "Bequest"—"Election"—"Husband and Wife," 2—"Executory Devise."

LIMITATIONS, STATUTE OF.

1. By the act of 1715, (Rev., ch. 2, s. 5,) one year is the limitation to an action for trespass *vi et armis* to personal property. *Swink v. Fort*, 113.

2. Where the owner of slaves made a parol gift of them to his son-in-law, who bequeathed them to his children, and died leaving his father-in-law executor of his will and guardian of his children, *it was held*, that the taking possession of the slaves and hiring them out, first as executor and then as guardian, was not a possession adverse to the title of the father-in-law; and that the statute of limitations did not begin to run against him until he had permitted a division of the slaves between his grandchildren, and delivered them over. *Alston v. Hamlin*, 115.

3. An acknowledgement or promise to repel the statute of limitations, must be distinct and explicit; and where the plaintiff's claims consisted of two debts, only one of which was barred, a letter from the defendant to him, as follows: "I do now, and have always appreciated your favors and kindness to me; and they shall not go unrewarded by me; but I shall want some little time to meet your demands,"—is too vague to entitle the plaintiff to recover, as it may apply only to the debt which was not barred. *Smallwood v. Smallwood*, 330.

4. A promise to pay a debt barred by the statute of limitations, revives the old contract, or is evidence of similar continued

promises from the time the contract was made. Hence it follows, that the first promise should be declared on. And if the new promise be made after the writ is sued out, the plaintiff may recover. *Falls v. Sherrill*, 371.

5. If a new promise taking a case out of the statute of limitations, be made by or to an executor, the action must be brought on it. *Ibid.* 373.

6. When the new promise is conditional upon the performance of the condition, it is evidence of a previous absolute promise. *Ibid.* 374.

7. Where the guardian of a lunatic under an order for the sale of the lunatic's property, became the purchaser of a slave, and upon the lunatic's becoming of sound mind, settled with him and obtained a receipt for "all demands" and afterwards retained possession of the slave for more than three years; *it was held*, that although the purchase gave the guardian no title, the settlement and receipt were evidence of a demand for the slave, and that the subsequent possession was adverse, and barred the action of the lunatic. *Boyce v. Warren*, 498.

8. The possession of a slave by a donee under a parol gift made since the act of 1806, (1 Rev. Stat., c. 37, sec. 7) is that of a bailee, and no length of such possession will bar the title of the donor, but if he demand possession, and the donee refuses to deliver up the slave, claiming him as his own, his possession then becomes adverse to the donor, and after three years will bar his action. *Martin v. Harbin*, 504.

9. In order to repel the statute of limitations, there must be either an express promise to pay, or an explicit acknowledgement of a subsisting debt. *Mastin v. Waugh*, 517. See "Discontinuance"—"Partnership," 2—"Pleas and Pleading," 4.

MAIL CONTRACT.

When the Postmaster-General vacates a contract for carrying the mail, and transfers the route to another person upon condition of his paying the first contractor a stipulated sum, the first contractor acquires a vested right to such sum; and the Postmaster-General cannot subsequently discharge the second from its payment. *Dillard v. Carberry*, 280.

MALICIOUS MISCHIEF. See "Indictment," 4.

MALICIOUS PROSECUTION.

1. An action on the case lies against any person who maliciously and without probable cause prosecutes another *before any tribunal*, and thereby subjects him to an injury, either in his person, property or reputation. *Davis v. Gully*, 363.

2. A court of law can determine whether a suit in equity was wrongfully brought or not. *Ibid.* 363.

3. An action for a malicious prosecution cannot be sustained where a verdict and judgment of conviction have been had in a court of competent jurisdiction, although the party was afterwards acquitted upon an appeal to a superior tribunal. *Griffis v. Sellars*, 492.

MANSLAUGHTER.

A person convicted of manslaughter may be burned in the hand, and also imprisoned for any time not exceeding one year. The statute of 4 Henry, 7, c. 13, and 18 Eliz., c. 7, not being altered in this respect by the act of 1816, (1 Rev. Stat., c. 34, sec. 26 and 27). *State v. Henderson*, 543.

MARRIAGE ARTICLES.

Articles made in contemplation of marriage, whereby the intended husband "sells and assigns" to a trustee all the right in slaves belonging to the intended wife "which he by operation of law may thereafter have" do not pass a title in the slaves to the trustee, but are merely executory, and binding the husband after marriage, to make the necessary assurances to carry them into effect. *Cox v. Murphy*, 257. See "Evidence," 18.

MARRIAGE BROKAGE. See "Bond."

MARRIAGE. See "Evidence," 12, 13—"Indictment," 2.

MESNE PROFITS.

1. In trespass for mesne profits, the record of the recovery in ejectment is conclusive evidence of the title of the lessor of the plaintiff at the date of the demise; but it is no evidence at all that the defendant's possession commenced at that time, or at any time before the commencement of the action of ejectment; and the fact of its having commenced earlier than the last mentioned time must be proved *aliunde*. *Poston v. Jones*, 294.

2. The record of the recovery in ejectment, is conclusive in the suit for mesne profits, to establish the fact of the defendant's possession at the commencement of the ejectment, and it is also *prima facia* evidence of that possession being continued till the judgment and execution; but the defendant may, on the contrary, show that his possession terminated earlier than than time. *Ibid.* 294.

MILLS.

1. Where the erection of a mill on a stream causes the water to overflow the land or mill of a proprietor above, only when the stream is swollen, that circumstance will not excuse the party from damages altogether, but will only diminish the quantum of such damages. *Pugh v. Wheeler*, 50.

2. Each owner of land, through which a stream, not navigable, flows, has a right in consequence of such ownership, to apply the water on his own land, to purposes of profit; and in making such application he is at liberty at all times, to avail himself of every advantage which his particular situation affords, respect being had to the right of other proprietors above and below him on the same stream; and no other proprietor, either above or below him, can make any appropriation of the stream, so as to curtail or diminish his use of all his natural advantages, whether such appropriation were prior to his use, or not; unless if such appropriation was prior, it was for such a length of time as to raise the presumption of a grant. *Ibid.* 50.

3. If on a petition for damages caused by the erection of a mill, under the act of 1809, (Rev. c. 773) the jury return a verdict, assessing damages for more than one year before the filing of the petition, the court may correct it, by giving judgment for the damages of only one year previous. *Ibid.* 50.
4. In assessing damages under that act, the jury are not bound to give the damages at an average for the five years, but may assess different sums for different periods, during that time. *Ibid.* 50. See "Water."

MITTIMUS. See "Capius ad Satisfaciendum."

MURDER.

1. Every circumstance, however slight in itself, that is calculated to throw light on the commission of the supposed crime, is proper to be considered, although a verdict against the prisoner cannot be warranted by any combination of circumstances producing less than full assurance of his guilt. *State v. Swink*, 17.
2. If one man assails another, and is about to commit an unauthorized act of violence upon him, and a third person interposes to prevent it, and is killed by the assailant, it is murder. *State v. Benton*, 196. See "Evidence," 4.

NEGOTIABLE SECURITIES. See "Attachment," 10—"Bills, Bonds and Promissory Notes."

NEW TRIAL.

1. The disallowance of a legal challenge, whereby the party taking the exception, is compelled to accept as a juror, a person whom he had a right to reject, is a ground, not properly for a new trial, but for a *venire de novo*. It is the denial to him of an imperative rule of law, which vitiates the verdict, and lays a good foundation for a writ of error. *State v. Benton*, 206.
2. Matters which might have been introduced on the trial, but brought forward for the first time upon a motion for a new trial should not be acted upon by the court. *Gibson v. Partee*, 530.

NON-SUIT.

It is not error in law for the judge to refuse to non-suit the plaintiff; and if the defendant relies upon the objection, he should move it in the shape of instructions to the jury. *Hatchell v. Odom*, 304.

PARTITION. See "Estoppel," 5.

PARTNERSHIP.

1. If one partner borrows money upon his own credit, and gives his own separate security and obligation for the amount, the other partners will not be responsible for it, although it was applied to the use of the firm. *Willis v. Hill*, 231.
2. Although the admissions of a partner, made after a dissolution of the partnership, may be used to repel the statute of limitations and the like, yet that is confined to cases where the copartnership is proved *aliunde*. Such admissions are incompe-

tent to establish the debt originally, as one due by the partnership. *Ibid.* 231.

3. The case of Horton v. Child, 4 Dev. Rep., 460, does not decide that a partnership is bound for money borrowed for its use, but secured by the individual note of one partner; and it may well be doubted if such is the law. *Ibid.* 232.

4. A partnership security taken for the debt of one of the partners, without evidence of the assent of the others, is void at law. *Weed v. Richardson,* 535.

PLEAS AND PLEADING.

1. When a statute requires or directs a thing to be done in *a particular court,* as well as before a particular man, it cannot be done in or before any other. But where the subject matter is within the jurisdiction of any court, an objection to the jurisdiction of the court over the particular parties, must be made by a plea in abatement, and is too late after a plea in bar. *Bank v. Davenport,* 45.

2. Where the general issue and a special plea is pleaded to an action upon a bond, if the plaintiff means to rest his case upon the insufficiency of the special plea, he should demur to it. If he does not demur to the special plea, but traverses the matter pleaded, he cannot object to evidence which is relevant to support the plea. *Overman v. Clemmons,* 189.

3. If the jury find for the plaintiff upon the general issue, and for the defendant upon the special plea, the plaintiff may yet contest the sufficiency of the special plea, by praying judgment *non obstante veredicto.* *Ibid.* 190.

4. A court in a declaration for goods sold and delivered by the plaintiff, embraces equally the original promise implied by the law from the delivery of the articles, and a subsequent express promise to pay for them; because the time of the promise does not constitute a material part of the contract declared on. Hence such subsequent promise, if made within three years, may be proved in support of the declaration, and to repel the plea of the statute of limitations. *Finn v. Fitts,* 236.

5. If a *scire facias* be sued out upon a judgment of more than ten years' standing, without motion supported by an affidavit of the debt being due, the judgment unsatisfied, and the defendant living, it may be set aside for irregularity, provided the objection be taken in the first instance; but if the defendant plead to the merits, he cannot afterwards avail himself of this irregularity. *Hinton v. Oliver,* 519. See "Attachment," 2, 3, 8, 11—"Bond," 1—"Indictment," 5, 7, 8, 19—"Limitation, Statute of," 4, 5—"Practice," 1, 3.

POSSESSION.

1. A person in possession under a claim of title, who receives from an opposing claimant a lease for a year of the same land, cannot during that term, dispute the lessor's title or hold adversely to him. *Hartzog v. Hubbard,* 241.

2. Where two persons having opposing claims to certain slaves, both bail them to a third person, the possession of the bailee is not such a possession in either claimant as to divest the ad-

versary title, whatever it may be in the other; and the one who has the best right to the slaves, independent of the possession, will prevail in a suit for them. *Hamlin v. Alston*, 269. See "Fraud," 3—"Limitation, Statute of," 2, 7, 8—"Presumption"—"Water."

POWER.

1. In a will, the words, I leave all my land not given away, to be sold, and after my debts are paid, the residue of my estate to be divided between my wife, son and daughter;" together with the following in a codicil: "I nominate M. S. my executor to this my last will, to make sale of my land before mentioned, and to execute this instrument of writing in every respect," do not vest an estate in the executor, but only confer on him a power of sale. Neither are they a devise of the land to the wife and children. *Ferebee v. Proctor*, 439.

2. An administrator with the will annexed, cannot, by virtue of his appointment, execute a power of sale given to the executor. *Ibid.* 439.

3. Neither will a decree of a court of equity directing him to sell and convey, enable him to vest a legal estate in his vendee. That court has jurisdiction only to direct those having the legal estate, to join in a sale for the purpose of executing the trusts of the will, but has none to declare the legal title to be in any person, excepting the one in whom at law it vests. *Ibid.* 439.

4. A direction to sell land for the payment of debts, or for any other purpose which naturally brings the proceeds into the hands of the executor, vests by implication a power of sale in him. *Ibid.* 444.

5. A devise *to* the executor for the purposes of a sale is not to be presumed without a necessary implication, because giving him a power of sale effects the same result, and is more beneficial to the heir. *Ibid.* 444. See "Descent," 2—"Executors and Administrators," 2, 3.

PRACTICE.

1. Accepting of a declaration, and entering a plea is a waiver of any defect of process; and where process was executed upon five out of six defendants and all joined in a plea, the fact of its not having been executed upon all, does not work a discontinuance of the cause. *Jones v. Penland*, 358.

2. Upon the trial of an action commenced by original attachment, the court may permit the bond executed upon suing out the process to be cancelled, and another given in order to enable the plaintiff to examine a surety to it. *Garmon v. Barringer*, 503.

3. Upon a motion to be admitted a party to a suit under the act of 1798 (1 Rev. Stat., c. 2, sec. 4,) suggesting that the person moving had married the *feme sole* plaintiff, any objections to the validity of the marriage must be then made, or on an application afterwards made for rescinding the order of admission as having been improvidently made. But while such order remains in force no evidence can be received on the trial of the cause upon the issues, for the purpose of impeaching the validity of the marriage. *Hobbs v. Bush*, 508. See "Trial."

PRESUMPTION.

1. Where a mother and her illegitimate children resided upon different parts of the same tract of land, the latter, under a parol agreement for a conveyance from their mother, subject to a life estate in her, their respective possessions are consistent with her title; and however long continued no presumption of a deed arises from them. *Matthews v. Smith*, 287.
2. Any disability in the owner is a circumstance to repel the presumption arising from long continued possession, although such disability may have arisen since the commencement of the possession. *Ibid.* 287. See "Evidence," 29—"Mills," 2.

PRINCIPAL AND ACCUSSARY. See "Larceny."

PRINCIPAL AND AGENT. See "Agent."

PRIVATE PROPERTY TAKEN FOR THE USE OF THE PUBLIC.

1. Whether the legislature can in any case take private property for the use of the public, without providing compensation for it, Qu? But assuming that it cannot, it does not follow that the payment of the compensation must be precedent to, or contemporaneous with the taking. On the contrary, it is competent to the legislature to authorize the taking, leaving the assessment of the *quantum*, and the payment of the compensation, to be made subsequently. *R. R. v. Davis*, 451.

2. The assessment of the damages to be paid to private individuals for property directed by the legislature to be taken for the use of the public, need not be made by a jury of twelve freeholders; it not being a controversy respecting property within the meaning of the 14th section of the bill of rights. Nor is it such a "trial by jury" as that section requires to remain "sacred and inviolable." *Ibid.* 451.

3. In taking private property for the use of the public, as for a public highway, the legislature is not restricted to a mere easement in the property, but may take the entire interest of the individual, if, in the opinion of the legislature, the public exigency requires it. *Ibid.* 451. See "Rail Road Company."

PROBATE.

The probate of a deed is *ex parte*, and does not conclude except as to the *factum*, and the identity of the witness. The deed may still be shewn to be a forgery, or to have been executed by an infant or feme covert. *M'Kinnon v. M'Lean*, 85.

PROCESS—See "Depositions," 1, 2—"Discontinuance."

PROMISSORY NOTES. See "Bills, Bonds and Promissory Notes."

PROSECUTION BOND.

After the plaintiff has been permitted to go on and prepose his case for trial, the court will not upon the motion of the defendant, make a peremptory order, dismissing the suit for want of a prosecution bond, but will permit the plaintiff then to prepare and file such bond. The sole object of the bond is to secure the defendant, and the court will use its power in regard to it, so to protect him, and advance the purposes of justice. *Brittain v. Howell*, 107.

RAIL ROAD COMPANY.

A rail road company is a private corporation, its outlays and emoluments being private property; but the road constructed by them will be a public highway, and consequently they may, upon paying a fair compensation therefor, take private property, under the sanction of the legislature, for the use of the company, as being for a public use. *R. R. v. Davis*, 451.

RAPE. See "Indictment."

RECOGNIZANCE. See "*Scire Facias.*"

RECORD.

Every thing which is stated in a record as a *fact*, is to be taken as such, because, the law reposes entire confidence in the integrity of the court; but where the record only states the evidence, without any judgment of the court ascertaining the fact sought to be established by it, no other court can draw the inference of fact from such evidence, and act upon it as a fact. *State v. Ephraim*, 162. See "Amendment," 2—"Case stated for the Supreme Court."

REGISTRATION.

1. The act of 1829, c. 20, differs from the act of 1820, (Rev. c. 1037) in that the latter makes deeds in trust void, unless registered within six months, and there is nothing in it to denote that any thing short of a complete registration, by fully thansscribing the instrument into the books of the register, is to be a registration, or constitute part of it; but the former does not avoid a deed of trust for want of registration at any particular time, but declares that it shall not operate "but from" the registration; and that is deemed to be done on the day of its delivery to the register, as noted by him on the deed. *M'Kinnon v. M'Lean*, 79.

2. Schedules annexed to a deed in trust, and referred to therein, are parts thereof and must be registered; but such registration will be taken as having been made on the day when the deed itself is deemed to have been registered. *Ibid.* 79.

3. A deed in trust admitted to registration upon a probate by an incompetent witness, is not therefore void for want of probate and registration, but will be received: in evidence on a trial, if it be then proved by competent testimony. *Ibid.* 79.

4. If two or more distinct acts are necessary to give validity to a deed, both must be performed, and one cannot be connected with the other; as in the case of probate and registration—the latter cannot relate in point of time to the former. But wherever, as in the case of registration alone, there is necessarily more than an instant consumed in the performance of a single act, the whole is one continuing act, and therefore in legal contemplation, is done from the commencement. *Ibid.* 83.

5. The act of 1829, c. 20, was taken from the English annuity act, and should therefore receive the same construction with that act. *Ibid.* 84.

REMAINDER. See "Execution," 4—"Husband and Wife," 1.

ROAD.

1. If a road be established as a highway by an erroneous judgment of the county court, it will be a nuisance to obstruct it, until the judgment be reversed. It is enough that the way obstructed is a public road *de facto*, to constitute the obstruction of it a public nuisance. But where the proceedings to change a road, state no road as having been prepared; nor describe where the altered road is to run, except that it is to be brought nearer a particular house; and the prayer is only that "an order may be made" for turning the road, and then an entry appears that "said report was confirmed, and duly entered of record," there is no sufficient judgment for establishing the road as altered, and it is not a nuisance to obstruct it. *State v. Spainhour*, 547.

2. In a petition to turn a road under the act of 1834, (1 Rev. Stat. c. 104, sec. 7) it must appear that the road proposed to be changed, as well as that offered to be substituted, are wholly upon the land of the petitioner; the freholders must also be sworn, and the overseer of the road have notice. *Ibid.* 550.

RUNARAY SLAVE. See "Harboring."

SCHOOLMASTER.

The law confides to schoolmasters and teachers, a discretionary power in the infliction of punishment upon their pupils, and will not hold them responsible criminally, unless the punishment be such as to occasion permanent injury to the child; or be inflicted merely to gratify their own evil passions. *State v. Pendergrass*, 365.

SCIRE FACIAS.

1. A *scire facias* reciting that the defendant "was lately bound in a recognizance in &c.,, for the appearance of T. S. at &c.; that the said T. S. failed to make his appearance, as *he* was bound to do; and that it was thereupon ordered by the said court, that he forfeit his recognizance, according to law," and commanded the sheriff to make known &c., is irregular, uncertain and defective. And although the objections to it cannot be taken upon the plea of *nul tiel record*, a *capeter* is the only proper judgment. *State v. Mills*, 552.

2. A recognizance is a debt of record, and is of the nature of a conditional judgment, which the recorded default makes absolute, subject only to such matters of legal avoidance as may be shewn by plea; or to such matters of relief as may induce the court to remit or mitigate the forfeiture; and the object of a *scire facias* is to notify the cognizor to shew cause why the cognizee should not have execution of the sum acknowledged. The act of 1777 (1 Rev. Stat. c. 35, sec. 32) makes it *imperative* that the *scire facias* shall issue and judgment be had thereon, previous to suing out execution upon a forfeited recognizance. But no *judgment* of forfeiture is thereby required before the issuing of the *scire facias*. *Ibid.* 552. See "Entry and Grant"—"Judgment," 5—"Pleas and Pleading," 5.

SHERIFF.

1. If a sheriff arrest the defendant in a *ca. sa.* and then suffer

him to go at large, he cannot afterwards retake him; and if he does so, he is liable to the defendant in an action for trespass and false imprisonment. So also if the arrest be made, and escape be suffered by a deputy, the principal sheriff is responsible for the arrest and false imprisonment by reason of the second arrest, although the latter was made out of his county, it being by color of the deputy's office. *Spencer v. Moore*, 264. See "Execution," 1, 2, 3.

SHERIFF'S DEED.

1. One who bids off land at a sheriff's sale may relinquish his bid to another either in writing, or by parol, and the sheriff's deed to the latter will be valid. *Testerman v. Poe*, 103.

2. A sheriff's deed relates to the time of the sale, and operates from that time against any subsequent transfer, whether made by the party or by the sheriff under an execution against the party. *Ibid.* 103.

3. The deed of the sheriff professes to transfer property, in execution of an authority confided to him by law, and is not to be construed with the same favour to the vendee, as the deed of an individual disposing of things over which he claims uncontrolled dominion. *Knight v. Leak*, 136.

4. Nothing can pass by the sheriff's deed, but that which he has levied upon, and which was known at the time of sale as the subject matter thereof. *Ibid.* 137.

SHERIFF'S SALE.

Upon an execution against A and B., if the sheriff levies upon and sells a certain slave, who was in the possession of A., as the absolute property of A., and in the bill of sale describes the slave as the property of A., the interest of B. in such slave, will not pass by such sale, though in fact A. had only a limited interest in the slave, and B. was entitled to the absolute property in remainder. *Knight v. Leak*, 133. See "Justice's Judgment."

SLANDER.

In slander, the words are to be taken as having been used in their ordinary acceptation among those in whose presence they were uttered. *Hamilton v. Smith*, 274. See "Discontinuance" —"Evidence," 23.

SLAVES.

In an indictment, under the act of 1779, (Rev. c. 142) for seducing and conveying away a slave, it was held by the court, *Gaston, J.*, dissenting, that the seduction *and* conveying away must concur to constitute the offence; and that one, who did not himself seduce or aid in seducing the slave, but only assisted in the conveying away, could not be convicted as a principal felon. *State v. Hardin*, 407. See "Advancements"—"Bequest," 1—"Estoppel," 1, 2—"Evidence," 12, 13—"Execution," 4—"Harboring, Indictment," 13, 14, 15, 16—"Limitations, Statute of," 2, 7, 8—"Stealing Slaves."

STATUTES CONSTRUED OR COMMENTED UPON.

4. Henry, 7 c. 13, (1 Rev. Stat. c. 34, sec. 26). *State v. Henderson*, 543.
18. Eliz. c. 7, sec. 283 (Rev. Stat. c. 34, sec. 27). *State v. Henderson*, 453.
1715. (Rev. c. 2, sec. 5). *Swink v. Fort*, 113.
1715. (1 Rev. stat. c. 65, sec. 3). *Smallwood v. Smallwood*, 330.
1715. (1 Rev. stat. c. 65, sec. 3). *Falls v. Sherill*, 371.
1715. (1 Rev. stat. c. 65, sec. 3). *Mastin v. Waugh*, 517.
1729. (Rev. c. 19, sec. 9). *State v. Samuels*, 177.
1769. (1 Rev stat. c. 5, sec. 3). *Wyatt v. Morris*, 108.
1769. (1 Rev. stat. c. 5, sec. 3). *Goodbread v. Wells*, 476.
1777. (1 Rev. stat. c. 31, sec. 53). *Duncan v. Hill*, 291.
1777. 1 Rev. stat. c. 6, sec. 1). *Skinner v. Moore*, 138.
1777. (1 Rev. stat. c. 35, sec. 19). *State v. Morgan*, 348.
1778. (1 Rev. stat. c. 71, sec. 2, 3, 4). *State v. Loftin*, 31.
1779. (1 Rev. stat. c. 34, sec. 10). *State v. Haney*, 390.
1779. (Rev. stat. c. 34, sec. 10). *State v. Hardin*, 407.
1784. (1 Rev. stat. c. 37, sec. 19). *Bell v. Carpenter*, 18.
1784. (1 Rev. stat. c. 43, sec. 2). *Motley v. Whitemore*, 537.
1786. (1 Rev. stat. c. 13, sec. 3). *Alexander v. Oaks*, 513.
1789. (1 Rev. stat. c. 122, sec. 6) *Bethel v. Moore*, 311.
1789. (1 Rev. stat. c. 85, sec. 1). *Mills v. Witherington*, 433.
1790. (1 Rev. stat. c. 81, sec. 6). *State Bank v. Davenport*, 45.
1791. (1 Rev. stat. c. 34, sec. 73). *Thomas v. Alexander*, 385.
1794. (1 Rev. stat. c. 62, sec. 16). *Ingram v. Kirby*, 21.
1794. (1 Rev. stat. c. 62, sec. 21). *Mead v. Young*, 521.
1797. (1 Rev. stat. c. 31, sec. 125). *Duncan v. Hill*, 293.
1798. (1 Rev. stat. c. 2, sec. 4). *Hobbs v. Bush*, 508.
1798. (Taylor's Rev. app. page 193). *O'Kelly v. Clayton*, 246.
1802. (1 Rev. stat. c. 44, sec. 8). *Knight v. Wall*, 125.
1806. (1 Rev. stat. c. 37, sec. 17). *Thompson v. Todd*, 63.
1806. (1 Rev. stat. c. 37, sec. 17). *Bell v. Carpenter*, 18.
1806. (1 Rev. stat. c. 37, sec. 17). *Alston v. Hamlin*, 115.
1806. (1 Rev. stat. c. 37, sec. 17). *Knight v. Wall*, 125.
1806. (1 Rev. stat. c. 37, sec. 17). *Martin v. Harbin*, 504.
1809. (1 Rev. stat. c. 81, sec. 6). *State Bank v. Davenport*, 45.
1809. (1 Rev. stat. c. 74, sec. 13). *Pugh v. Wheeler*, 50.
1811. (1 Rev. stat. c. 35, sec. 12). *State v. Jessey*, 299.
1814. (1 Rev. stat. c. 39, sec. 2). *Whittington v. Whittington*, 64.
1814. (1 Rev. stat. c. 39, sec. 3). *Wilson v. Wilson*, 377.
1816. (1 Rev. stat. c. 34, sec. 26). *State v. Henderson*, 543.
1819. (1 Rev. stat. c. 81, sec. 4). *State Bank v. Davenport*, 45.
1820. (1 Rev. stat. c. 65, sec. 18). *Martin v. Harbin*, 50.
1820. (1 Rev. stat. c. 75, sec. 18). *Alston v. Hamlin*, 115.
1820. (1 Rev stat. c. 65, sec. 18). *Boyce v. Warren*, 498.
1822. (1 Rev. stat. c. 58, sec. 7). *Smallwood v. Wood*, 356.
1822. (1 Rev. stat. c. 58, sec. 7). *Woodland v. Dean*, 490.
1823. (1 Rev. stat. c. 111, sec. 78). *State v. Jesse*, 297.
1829. (1 Rev. stat. c. 37, sec. 24). *M'Kinnon v. M'Lean*, 79.
1830. (Pamphlet acts c. 10). *State v. Ritchie*, 29.
1830. (1 Rev. stat. c. 35, sec. 17). *State v. Benton*, 192.
1831. (1 Rev. stat. c. 111, sec. 86). *State v. Oxendine*, 435.
1831. (1 Rev. stat. c. 4, sec. 23). *Bank of the State v. Taylor*, 250.

STEALING SLAVES. See "Indictment," 13, 14, 15, 16.

SUPREME COURT.

It is the settled rule of the Supreme Court, to affirm every judgment not seen to be erroneous. *Thomas v. Alexander*, 385. See "Evidence," 1.

SURETY. See "Executors and Administrators," 1—"Justices," 2.

TENANT IN COMMON.

1. Joint owners of a chattel have equal right to the possession of it; and therefore the exclusive possession of the chattel by one, will not entitle the other to maintain trover against him for it. *Cole v. Terry*, 252.

2. Where one labors upon the farm of another, upon an agreement to have a share of the crop, before his share is separated from the general mass, and set apart for him, the property in the entire crop, remains in his employer. *State v. Jones*, 546. See "Ejectment," 1, 2.—"Larceny," 2.

TRANSCRIPT. See "Judgment," 1.

TRESPASS QUAM CLAUSUM FREGIT. See "Estoppel," 4.

TRESPASS VIE ET ARMIS. See "Arrest," 3—"Limitations, Statute of," 1.

TRIAL.

Where there are several counts in an indictment, the state *may* be ruled to elect upon which the trial shall be had; but this is done only to prevent injury to the accused where the counts contain charges of disinct offences, but never where they are only variations in the mode of charging the same. *State v. Haney*, 390. See "New Trial," 1.

USURY.

A return by the sheriff of satisfaction to an execution issued on a judgment for a debt infected with usury, is not sufficient evidence of the receipt of the usurious interest, to charge the lender in an action for the penalty. *Wright v. McGibbons*, 474.

VENIRE DE NOVO. See "New Trial," 1.

VERDICT.

1. It is no ground for vacating the verdict, or arresting the judgment for one of the jurors in rendering the verdict to declare, that being forced by the laws of his country, he was bound to say, that the defendant was guilty. *State v. Swink*, 10.

2. In an action of debt upon a penal bond, where the declaration states all the conditions to be broken, the verdict of the jury, which finds "the conditions of the bond" not to have been performed but broken, need not specify the particular *breaches* upon which the damages are assessed. That is proper only when some of the conditions are found to be broken, and others not broken. *Gibson v. Windsor*, 27.

3. Upon an issue joined, on the plea of *nil debent*, to a proceeding under a statute against certain persons, as the sureties of the clerk, for not paying over money received by him officially,

a verdict finding certain special facts—as that the money mentioned in the notice was paid to the clerk on a certain day, and was demanded, instead of finding specially all the facts on which the defendant's liability arose, or finding generally, that they owed the plaintiff by reason of the matters set forth in the notice, the principal money demanded and assessed, and the interest according to the statute—is defective. *Bank v. Davenport*, 45.

4. If, upon the pleas of *non assumpsit*, and *the statutes of limitations*, the jury find both issues in favor of the defendant, it will be unnecessary to consider the propriety of the instructions given in relation to the latter plea. *Mastin v. Waugh*, 517.

WARRANT.

1. If a warrant state the parties, the sum demanded and how due, it is sufficient. *Hamilton v. Jervis*, 227.

2. A warrant to arrest persons neither named nor described, is void. And one reciting that A. B. "and company" had committed an offence, and commanding the officer to apprehend "said company," will not justify the arrest of any person; for the mandatory part does not direct the taking of A. B. by name, or by any description, and it is not helped by the recital; for the words "said company" refer only to the company with A. B. and not to A. B. himself. *Mead v. Young*, 521.

3. Criminal process, defective for uncertainty in the description of the defendant, is not aided by the act of 1794, (Rev., c. 414,) providing that warrants shall not be set aside for want of form for that act, in its terms, applies to civil process only; and besides, the description of the defendant is matter of substance. *Ibid.* 521.

4. Whether a warrant containing a mandate for a seizing a certain person, and others neither named nor described, is altogether null under sec. 11 of our Bill of Rights; or whether it is null only so far as it is uncertain, and is good for the residue. Qu.? *Ibid.* 525.

5. A warrant for the apprehension of a man's person cannot be rightfully altered after it has *finally* left the hands of the magistrate who issued it. And if it be altered by another magistrate after it has been so issued, by inserting the name of another person to be apprehended, it will be no justification to the officer who executes it for taking such other person. *Haskins v. Young*, 527. See "Arrest," 1, 2, 4—"Justice's Jurisdiction," 1.

WARRANTY. See "Evidence," 9, 10.

WATER.

1. When the parties claim respectively upon their possession as in the case of prescription rights, the application of the water of a stream to some particular and useful purpose, is an appropriation of it, which gives the right to the perpetual use of it in the same way, against all persons who may not have previously applied it to some other use inconsistent therewith. *Pugh v. Wheeler*, 53.

2. There is no prior or posterior in the use of the water, by the owners of the land on a stream; and the priority of a particular

new application, or artificial use of the water, does not therefore create the right to that use; but the existence or the non-existence of that application at a particular time, measures the damages incurred by the wrongful act of another, in derogation of the general right to the use of the water, as it passes to, through or from the land of the party complaining. *Ibid.* 55. See "Mills," 2.

WILLS

1. The interpretation of a will made in another state, must be determined according to the laws of that state. *Knight v. Wall,* 129.

2. The act of 1789, (Rev., ch. 308,) requiring a will when contested, to be proved by all the attesting witnesses, if to be found, is satisfied by proof of their handwriting, if they are out of the state, lunatic or the like. *Bethell v. Moore,* 311.

3. Where there are three attesting witnesses to a will, all of whom reside beyond the limits of the state, proof of the handwriting of two of them is sufficient to admit the will to probate. *Ibid.* 311.

4. A cancellation is *prima facie* a revocation; but if made with the intent of executing a new will, and that intent fails, the cancellation is conditional and shall have no effect. *Ibid.* 311.

5. Cancellation of a will, by drawing lines across it, is an equivocal act, and whether it amounts to a revocation, depends upon the intent with which it was done. This intent may be gathered from contemporaneous acts of the testator; and where he cancelled his signature, and afterwards signed the will anew, and by a codicil attached referred to it, sealed the whole up together, and deposited it among his valuable papers; the jury may from these facts infer, that the cancellation was not intended as an absolute revocation; but made with the view to another will, which was afterwards abandoned. *Ibid.* 311.

6. Whether a paper not written by the testator becomes a part of his will, by being referred to in a will written wholly by him, and deposited among his valuables. Qu.? *Ibid.* 316.

7. A paper writing executed by two persons, making, after both their deaths, a joint disposition of all their property, cannot be admitted to probate as a mutual or conjoint will. And *it was held,* Daniel, J., dissenting, that such a paper writing could not be proved as the separate will of either of the supposed testators, because it *purported* to be a *joint,* and not a *separate* will; and because it implied from its structure, an agreement between them, which was inconsistent with its revocability, and therefore prevented its operation as a will. *Clayton v. Liverman,* 558. See "Devise"—"Evidence," 11.

WITNESS. See "Evidence," 7, 8, 12, 13, 14, 15, 22, 25, 27, 28—"Wills," 2, 3.

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